Customary Māori Freshwater Fishing Rights: an exploration of Māori evidence and Pākehā interpretations

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LIST OF MAPS AND ILLUSTRATIONS

ABSTRACT

This thesis explores the customary freshwater fishing rights of the New Zealand Māori through detailed examination of Māori evidence as to the nature and extent of these rights, and of Pākehā interpretations based upon both observation and upon Māori evidence. Most of the recorded evidence from Māori who exercised customary fishing rights in the nineteenth century was given in Pākehā institutions, notably the Native Land Court. The legal, political and intellectual context in which Māori gave their evidence is important for an understanding of Pākehā interpretations constructed from Māori evidence, and for the analysis of this evidence.

In the first part of the thesis, modern reinterpretations of customary Māori rights (based on both traditional Māori knowledge and recent research) are examined for an understanding of Māori concepts of their freshwater fishing rights. The development of successive Pākehā interpretations of Māori customary rights from the beginnings of Pākehā settlement is then traced and contextualized. Particular attention is paid to the Native Land Court minutes, the most comprehensive source for Māori statements on fishing rights. The impact of the Court on the way Māori gave evidence and on Pākehā interpretations of Māori tenure and rights, the Court's legislative framework and key methodological issues are analysed.

The second part of the thesis comprises four local case studies, which use Court evidence given by Māori to analyse in depth the nature and extent of freshwater fishing rights. Wairarapa Moana provides examples of both a large seasonal eel fishery, and a smaller-scale fishery in the fringing swamps. Lake Taupō is an example of a large lake fishery with a range of species, while the Whanganui River had a large and varied river fishery. The themes explored include the derivation of title and rights, the scale of fishing rights, relationships between land and fisheries, and issues of property rights, management and control.

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INTRODUCTION

This thesis was initially generated out of an interest in the nature of customary Māori freshwater fishing rights, and was then broadened to encompass a growing interest in the way that those customary rights were regarded by Pākehā[1] and dealt with by the Pākehā political and legal systems from the beginning of settlement up to the present day. Even the most cursory examination of pre-contact Māori society is enough to show that freshwater fishing was a hugely significant part of the economy and the whole social fabric (especially for those tribes with limited other resources) — firstly for subsistence, but also for wider economic benefits such as trade or gift exchange and feast giving; all of which enhanced the mana of the tribe through demonstrating its wealth. The importance of these fisheries raises the question of how rights to such an important resource were determined and regulated, and of the nature and extent of those rights.

This analysis of the nature and extent of customary Māori freshwater fishing rights, which is based upon an examination of fishing rights in three lakes and rivers of the North Island of New Zealand, takes place within the context of a recent resurgence of interest in Māori land and resource rights issues. This new interest is largely a result of the current political and legal process of resolution of Māori grievances stemming from Crown breaches of the Treaty of Waitangi, signed between the British Crown and Māori chiefs in 1840. One of the main features of this resolution process has been the investigation of the nature of customary Māori rights in a manner which respects and draws freely upon Māori knowledge and concepts. This is possible not only because of the large amount of traditional knowledge still held by Māori kaumātua (elders) and scholars, but also because there is a substantial body of recorded evidence on customary Māori fishing rights, in the form of Māori evidence before official institutions such as the Native Land Court[2] and Commissions of Enquiry in both the nineteenth and twentieth centuries.

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1 The term 'Pākehā' refers to New Zealanders of European descent. It has been used by Māori since the earliest days of contact and is increasingly used as a term of self-reference by white New Zealanders. When used in this thesis in a nineteenth century context, it refers to the actions and thought patterns of those who chose to settle and stay in New Zealand and saw themselves as Pākehā (the term New Zealander then referring to the Māori), in contrast to those who retained a much stronger British or Western identity and perspective. In a twentieth century context, it refers to all white New Zealanders and their institutions.

2 The Native Land Court, established in 1865 to investigate customary title to Māori land, was renamed the Māori Land Court when the Maori Purposes Act 1947 removed all legislative and institutional references to

The bodies which gathered this evidence from Māori fishermen and women as to the nature and extent of their freshwater fishing rights were almost all operating within a wider context of the legal investigation of Māori land tenure and property rights in general. Customary Māori ownership of all land in New Zealand was recognized from the earliest stages of colonial administration, for reasons of both principle and pragmatism,[3] and this led to an interest in customary Māori land tenure. Subsequent moves by the Crown to formalize customary Māori land title and convert it to a Crown-derived title through the agency of the Native Land Court resulted in the recording of vast amounts of evidence from Māori on customary land tenure and associated resource rights issues, including freshwater fishing rights. This extremely detailed as well as substantial Court evidence is testimony to the considerable extent and complexity of Māori tenure and fishing rights, and it provides the basis for the analysis of fishing rights in the second part of the thesis. The indigenous freshwater fisheries themselves were not of great interest to Pākehā settlers or administrators because of their perceived lack of economic or sporting value. Rights to these fisheries were considered alongside questions of land tenure by Pākehā only because the importance of the fisheries to Māori led them to discuss their fishing rights alongside their land rights in fora such as the Native Land Court.

The different economic priority given to freshwater fisheries by Māori and Pākehā was just one of the many factors which influenced the ways in which Pākehā interpreted their own observations and the evidence presented by Māori. Pākehā had examined aspects of Māori society such as fishing rights from the earliest days of settlement, and their observations shaped initial archetypes of fishing rights. However, succeeding Pākehā interpretations of land rights in general (including freshwater fishing rights) were also greatly influenced by the wider political, legal and intellectual climate, and by more general Pākehā perceptions of Māori society and rights. Most of the recorded nineteenth century Māori evidence dealing with fishing rights is contained in the records of official institutions, all of which had agendas set by Pākehā to

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'Natives'. However, as almost all of the Land Court cases referred to in this thesis predate this change in terminology, the court will be described throughout by its contemporary title of Native Land Court.

3 This recognition of Māori property rights was not without debate, as British colonial officials sought to appropriate 'waste' or unoccupied Māori lands for the Crown demesne, but within a few years of annexation it was accepted that Māori territorial rights in New Zealand were not reliant on permanent occupation. See Paul McHugh The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi Auckland: Oxford University Press, 1991, pp.97-113; Ann Parsonson 'The Challenge to Mana Māori' in Geoffrey W. Rice (ed.) The Oxford History of New Zealand Second Edition Auckland: Oxford University Press, 1992, pp.176-178

accommodate Pākehā concerns. Even for most of the twentieth century, when Pākehā interest in Māori fishing rights was usually academic in focus rather than political or legal, Māori rights were interpreted within the parameters of ethnographic or anthropological research. It is only in very recent times that a significant Māori involvement in the process of investigating customary Māori rights has enabled these Pākehā interpretations to be stripped away, allowing commentators to account for the filters imposed by earlier interpretations and to return to the original Māori sources to establish a framework for analysis.

Māori forced to demonstrate and justify their fishing rights in Pākehā environments learned to take account of the divergences between Pākehā interpretations and their own concepts of their rights, and to shape their evidence accordingly. For this reason, the recorded nineteenth century evidence of Māori freshwater fishing rights cannot be used uncritically. Māori recognized Pākehā preoccupations, and taking into account the great need to win cases in the Native Land Court and thereby preserve their property rights, they appear to have interpreted their own rights in a manner likely to accord with the judge's known views on Māori tenure. This imperative was counter-balanced by the need to also prove their rights before their relatives and adversaries in the Court. Yet some areas of influence are clear, such as the discussion of fishing rights as simply part of the bundle of land rights (in line with Western legal concepts) rather than a separate and fully-fledged form of property. Māori were able to discuss the full extent of their fishing rights only when the fishing rights themselves were the focus of debate; this mostly occurred when the fisheries in question were an impediment to Pākehā expansion or development.

Both Māori evidence on freshwater fishing rights and Pākehā interpretations of these rights have been subject to external influences. Any analysis of customary fishing rights based on this material requires an assessment both of those influences, and of the actual nature and extent of these customary rights. An understanding of the modern discussion of customary Māori rights has also been crucial in this process of analysis. It has already been emphasized that recent research has concentrated on stripping away the layers of interpretation to give precedence to Māori principles and interpretations, and that Māori have been able to reshape public understanding of customary rights. The result has been a substantially different reinterpretation of customary freshwater fishing rights.

As the writer is Pākehā, this thesis does not attempt to study the nature and extent of customary Māori freshwater fishing rights from a wholly Māori perspective, and it is not written from the point of view of customary Māori fishers. That would have required the use of

considerable oral evidence from contemporary traditional Māori fishers and experts on customary practices to supplement the Native Land Court material and other written sources, and was far beyond the planned scope of the thesis, and the background and skills of the writer. The focus is on what Māori said in the Native Land Court and other Pākehā-influenced environments, and on how Pākehā interpreted what Māori said, as a basis for understanding and analysing recorded Māori evidence concerning freshwater fishing rights.

Because of the factors outlined above, the first part of the thesis is devoted to establishing the context for understanding the case studies which follow. The filters imposed on Māori evidence in the form of Pākehā layers of legal and academic interpretation are considered; and the nature of the mostly legal institutions in which Māori discussed their rights is explored, alongside the Pākehā agendas and preoccupations which determined the nature of the environments in which Māori were required to assert their rights. The first two chapters trace the development of (largely Pākehā) public concepts of customary Māori freshwater fishing rights. This is prefaced by an analysis of the contemporary model; recent examinations of customary Māori rights have sought to remove the layers of Pākehā interpretation and return to the underlying Māori concepts, and this provides a basis from which to determine the Pākehā influence in earlier interpretations.

Māori customary rights in general have surged back into the public arena over the last ten or twenty years, due to increasingly vocal Māori protest over the erosion of their few remaining rights and the subsequent attempts of successive governments and the judicial system to remedy past breaches of Māori rights. The process of grievance resolution has had two broad arms — the work of the Waitangi Tribunal, and developments in New Zealand's common law legal system. The Tribunal in particular has been a prime mover in awakening public awareness of the nature of customary fishing rights. Established in 1975 to report on alleged contemporary Crown breaches of the Treaty of Waitangi, in 1985 its powers were widened so that it could consider historical grievances going back to the signing of the Treaty of Waitangi in 1840. The Tribunal is composed of a roughly equal number of Māori and Pākehā members, from a variety of backgrounds; many of the Māori members in particular are steeped in both Māori and Pākehā traditions of learning. Among the many claims filed with the Tribunal since the early 1980s have been a number concerning both historical and contemporary grievances over fishing rights. This has led the Tribunal to reassess the established Pākehā model of fishing rights in the light of the

evidence given to them by Māori, which often contested this Pākehā model or sought to broaden understanding of key issues. Out of this ongoing process of debate and discussion has emerged a conscious reinterpretation, abandoning the weaker aspects of the old Pākehā model and drawing on both the expertise and local knowledge of the Māori claimants and recent academic research to provide a better understanding of the nature and extent of freshwater fishing rights.

Court-led legal developments, particularly the recent re-emergence of the principle of colonial common law known as the doctrine of aboriginal title, have also had an influence on the perception of customary Māori fishing rights. Contemporary cases based on the doctrine of aboriginal title rely on an understanding of the nature of customary fishing rights; but these recent cases have been significant mainly because of their contribution to the resolution of contemporary Māori grievances. While they deal in passing with the nature of customary rights, they mostly revolve around the interpretation of points of Pākehā law, and as a result no more than an overview of the relevant cases has been given. The Waitangi Tribunal also concentrates on the contemporary situation, but there is a much stronger historical focus to the Tribunal's work, reflected in its practice of producing reports which give a comprehensive examination of the historical context of each grievance before going on to raise points of general principle and make recommendations for the resolution of grievances. The comprehensive research on the nature of customary fishing rights which has arisen from the work of the Waitangi Tribunal and the courts (and also government departments which deal with Māori land and resource rights) has been complemented and often overlapped by a corresponding increase in academic interest in both customary and contemporary Māori society and rights.

All of this recent research has arisen out of something of a vacuum. Māori land and fishing rights were not a public or political issue for most of the twentieth century, and therefore public discussion of them was extremely limited. However, customary fishing rights continued to be examined and reinterpreted by a few ethnologists and anthropologists, usually incidentally to other aspects of their work, and the key points of their interpretations will be examined as a stage of development in the Pākehā framework. The ethnologists were concerned primarily with recording what they saw as the last vestiges of customary Māori society, and concentrated on aspects such as material culture (the process and tools of fishing), or spiritual aspects such as rituals. Very few were interested in the nature of fishing rights themselves, or seemed aware of the impact of Pākehā settlement on these rights and on Māori society as a whole. The anthro-

pologists were more interested in aspects of customary society such as rights, but often these were discussed only as a part of a larger topic, such as economic organization, were discussed as background to work on contemporary Māori society, or were confined into rigidly-structured general models of social and economic organization. None of these approaches allowed for an analysis of the nuances and complexity to be found on closer investigation of the nature of freshwater fishing rights.

This comparative neglect contrasts sharply with the interest shown in freshwater fisheries and in Māori land tenure in general, in both the late twentieth and the nineteenth centuries. The nineteenth century discussion of Māori customary rights was conducted against a background of public interest in the extent of these rights and the implications that these had for Pākehā (as is still the case), and this was significant to the development of Pākehā interpretations of freshwater fishing rights. The degree to which customary Māori rights were to be upheld when they came into conflict with settler aspirations was a major consideration in the process of extension of substantive sovereignty and control, and the interpretation of Māori rights in this period was carried out in an environment that was much more political than academic. The changing patterns of race relations and politics in New Zealand in the nineteenth century are reflected in changing interpretations of Māori fishing rights. The comments of early Pākehā observers shaped an initial archetype of fishing rights in the few decades leading up to the mid 1850s, but this was then reassessed in the light of changes in perceptions of Māori society and rights. These changes were prompted by not only increasing tensions over land dealings in the late 1850s and the New Zealand Wars of the 1860s and early 1870s, but also by Māori participation in official fora such as the Native Land Court. Māori who participated in these institutions with their Pākehā-set agendas were forced to take Pākehā prejudices into account.

The Native Land Court played a key role in the process of interpretation, and built upon earlier interpretations and assumptions as well as developing its own. It was created in 1865 out of the experiences of the wars in Taranaki and Waikato. In Taranaki, disputed Māori land ownership had been a crucial factor in the outbreak of war; and the Native Land Court was established to investigate ownership of Māori land before it was sold, and therefore to give a secure title to Pākehā buyers. One of the main functions of the Court was to facilitate alienation and settlement, and its whole being was coloured by Pākehā concerns. Because the case studies in the second part of the thesis are based substantially on evidence given by Māori in Native Land Court cases in the later nineteenth century, the ideas which influenced the reasoning of judges,

and the developing codification of customary Māori tenure by the Court as time went on, are vital to an understanding of Māori evidence given in the Court. In addition to the broader legal and intellectual framework, the provisions of the legislation and the form that Court cases took also influenced Māori evidence and these too are examined in some detail. The third chapter, which looks at the influence of Native Land Court legislation and practices on Māori evidence, also looks at some general issues related to the use of oral testimony and translated texts, as the minute books of the Court are a day-to-day record of the verbal evidence, which was mostly given in Māori but written down in English.

The fourth chapter gives a basic overview of native freshwater food species, the traditional Māori methods of catching these fish, methods of development and preservation of the resource, and a brief discussion of the wider social and cultural significance of fishing. At first glance, this may appear to be at odds with the focus of the rest of the thesis, which is about rights rather than practices. However, most work in the past has concentrated on one of these aspects to the near-total exclusion of the other. Many early Pākehā writers produced travelogues and commentaries which gave colourful descriptions of fishing practices, with no indication of the rights under which these fisheries were worked. Ethnologists and archaeologists too concentrated on the material culture and terminology of Māori fishing, without explaining its connection to the culture and organization of Māori society as a whole. On the other hand, many nineteenth century politicians and some twentieth century anthropologists discussed Māori fishing simply in terms of rights, without referring to the ways in which the fish were caught and the significance that this had for rights. The Waitangi Tribunal has avoided this division in most of its fisheries-focussed reports, and has not separated the ways in which a resource was used from the people who used it. While this thesis will concentrate primarily on rights, it is felt that an understanding of common fishing practices contributes to an understanding of the exercise of the associated fishing rights. It is easier to understand, for example, why rich eel fisheries are usually subject to rights at a hapū level when the amount of labour and skill needed to build the *pā tuna* and to weave the nets and *hīnaki* (eel pots) to catch those eels is also understood. Conversely, it is easier to see how limited personal rights could be maintained to some small fisheries when the simple technology needed to work those fisheries, and their small yields, are appreciated.

One of the overarching themes of the first part of this thesis is that the wider concerns of New Zealand society have always had considerable ramifications for the development of

Pākehā interpretations of aspects of Māori society such as freshwater fishing rights. Of course, this thesis too falls within this wider context. When customary Māori land tenure and rights have been prominent among mainstream political concerns, as they were in the late 1850s and early 1860s, and as they have been again since the early 1980s, there is a corresponding increase in public interest in and examination of the nature of those customary rights. The main difference between the two periods is that the twentieth century debate has also been supplemented by substantial amounts of academic research, both commissioned and independently generated, and written by both Māori and Pākehā scholars. Views from Māori actively involved with their iwi and hapū have also been given a prominent place in the twentieth century debate, rather than being pushed to one side as they were in the nineteenth century. In contrast, for most of the twentieth century Māori land and resource issues were not of significance to the general public, because almost all prime farmland had already moved into Pākehā ownership and the emphasis was on the integration and assimilation of Māori into mainstream Pākehā society. Then, discussion of Māori fishing rights was restricted to the ethnographers and anthropologists, most of whom tended to treat customary fishing rights as some sort of relic. They took a detached view of the society and culture they were discussing, and the work of many of them reflects the contemporary assumption that Māori culture and traditions, and even the people themselves, were in an irreversible state of decline.

In the second part of this thesis, the emphasis turns to an exploration and analysis of recorded Māori evidence as to the nature of their customary freshwater fishing rights. The successive Pākehā interpretations and more recent reinterpretations analysed in the first part form the contextual background to this Māori evidence. As has already been outlined, the evidence Māori gave in the Native Land Court and other official environments was significantly influenced by those environments, but there was a simultaneous need to give evidence which would be accepted by other Māori in the Court. Therefore, there is much valuable evidence of customary fishing rights to be found in the Court records. There is also evidence of the finer points of freshwater fishing rights which is not to be found elsewhere, as many of the blocks which came before the Native Land Court had numerous different claimant parties and substantial fisheries and land to be investigated. In some subdivision and partition cases, the rights of particular individuals to be included on the land, and their resource rights, were debated at some length.

The breadth and depth of evidence given to the Native Land Court allowed fisheries and fishing rights to be examined in great detail in this second part. One of the main features of most older Pākehā interpretations of freshwater fishing rights was that they took a modelled approach, seeking to develop a single archetypal set of rules. Study of the Court records shows that this was a flawed approach. Māori presenting their cases in the Court argued the origins and workings of their fishing rights in great detail, and also conveyed a great deal of information about the complex social relationships and concepts underlying these rights. The change in analytical method in the last fifteen or so years, giving precedence to Māori understandings of their own society, has led to a return to these primary sources and a rediscovery of this richness of detail. The claim-based focus of the Waitangi Tribunal has also encouraged the investigation of rights from a detailed and local point of view, rather than the construction of general models taking no account of time or place. The return to the rich but long-ignored records of what Māori themselves said about their rights in the nineteenth century has allowed a more detailed and complete analysis of fishing rights than was possible with the older methodological approaches.

The detailed analysis of freshwater fishing rights undertaken here comprises four case studies, drawn from three different regions. The reliance on the records of the Native Land Court restricted potential case studies to those areas where there had not been substantial purchases or confiscations of Māori land before the Court came into operation in 1865. This excluded almost all of the South Island and many North Island districts. The inland fisheries of some of these areas, most notably the bulk of the major freshwater fisheries of the South Island, have been reported on or are being considered by the Waitangi Tribunal, and this material has been drawn upon where appropriate. General South Island material has been included throughout the thesis because the differences between fishing practices in the North and South Islands were not great in comparison with many other aspects of economic and social organization such as horticulture and kinship arrangements, although the low population density in the middle and southern South Island meant that Ngāi Tahu fishers ranged over much greater distances than those in the North Island.

A balance was also sought between different general types of fishery. By far the most widely available and important freshwater fish was the eel, which dominated the fishery in many parts of the country. While it can cross dry land and survive out of water for some time, the eel cannot climb up steep waterfalls or form land-locked populations and is therefore absent from

many lakes in the central North Island. The eel is also most valuable as a food fish, and at its easiest to take, when it is on its annual breeding migration to the sea; it was more dominant in the fisheries of rivers or lakes with a narrow or barred mouth suitable for the mass capture of eels. Other lakes and rivers with wider mouths, or a greater range of flow types and local environments, contained a broader range of fishery types.

Combining all these factors, three different areas were chosen for their representative nature and availability of evidence. Wairarapa Moana was chosen as an example of a coastal lake dominated by the annual eel migration fishery. Enough evidence was found in the Native Land Court records to write another Wairarapa case study, dealing solely with the fisheries found in the swampy fringes to the east of the lakes. This was another important type of fishery, where there was a more even spread of fish available across the whole year and a greater reliance on lower-technology capture methods. These two fisheries were often used by the same people, as part of their seasonal resource round, and so there is an element of unity to the two Wairarapa case studies. Lake Taupō was chosen as an example of a land-locked fishery without eels, where the primary species were the smaller fish such as kōaro and inanga. Finally, the Whanganui River was chosen as an example of a large and diverse river fishery, stretching from the mountains of the Central Plateau to the sea. While the eel also predominates there, there were established fisheries for other species such as the lamprey, inanga and flounder. The Whanganui River is also the largest area canvassed in the case studies, in terms of both geographical range and available sources, and therefore this chapter is substantially longer than the other three.

The same basic structure has been applied in each case study — the first part of each looks at the nature of the waterway, the species available and the fishery; the history of Māori control of the district and its waterways; and the effects of Pākehā penetration and Crown actions on the customary freshwater fisheries of the area and Māori control of these fisheries. The focus of the sections dealing with pre-contact settlement and control is on those events and relationships among the people of the districts studied which are important to an understanding of the ways in which fishing rights were perceived and expressed. Relationships and conflicts between the different tribes or hapū in the area, historical events, loss of Māori control of the fisheries through Pākehā encroachment, and Pākehā-induced changes in the fishery all had implications for the ways in which people discussed waters and fisheries in the Native Land Court. The brief tribal histories are largely based on secondary sources and on passages of tribal history from the Court

minute books (many written tribal histories themselves drew heavily on this Native Land Court evidence). Only those events which establish the historical context within which people discussed their fishing rights in the Court are included, and so these overview histories are by no means comprehensive. No attempt has been made to reconcile differing versions or to subject the accounts to rigorous historical analysis.

Within these overview histories approximate dates have sometimes been given for important *tūpuna* (ancestors) and events. Any dates prior to about 1820 are necessarily inexact, and are supplied mainly for the purposes of establishing relative chronology, or demonstrating the antiquity of the rights or practices under discussion. The dates have either been calculated by counting generations in whakapapa and assigning 20 to 25 years per generation, or they have been drawn from the secondary sources, which usually employed the same method. This formula is unsatisfactory and so these dates have been kept to a minimum. Some dates have been drawn from archaeological research, the methodology of which is also subject to its own problems, and these dates too should be treated as merely indicative.

After establishing an historical context, and outlining the nature of the fishery of the region under discussion, the case studies then turn to an in-depth examination of Māori evidence as to the nature and extent of fishing rights in that fishery. While the weight of emphasis varies from area to area, there are some basic themes and questions which are common to all the case studies. Perhaps the most commonly discussed aspect of fishing rights in the Native Land Court was the derivation of or *take* to these rights. By far the most common *take*, or basis to land or fishing rights, was *take tupuna* or ancestral right — that is, people habitually asserted their fishing rights on the basis that the fishery had been used or owned by their ancestors. Once the basic *take* for each claim were laid down in the Native Land Court the extent of the claim could be expressed in a number of different ways. These ranged from a general claim by a hapū or group of hapū to the fisheries of a large area, based on the ownership or use of those fisheries by the eponymous hapū ancestor or ancestors, down to the claim of an individual to a share in a particular fishery based on the use of that fishery by a parent or other close relative. The nuances of these expressions of rights were often affected by factors such as the size and productivity of the fishery, the tribal organization of the area, and the social status of the person or group.

While the vast majority of Land Court claims to fisheries were based on *take tupuna*, other *take* were also put forward to justify the use of a fishery or to assert a right to it. Most

common among these other *take* were *take raupatu* or right by conquest (strictly this refers to the conquest of a large area by an invading force, but similar principles were involved in conflict over resources amongst closely related groups); *take tuku* or the gifting of land or resources, which often took place after conflict or as a payment for services rendered; and *take whanaunga* or the use of a resource through intermarriage or a kin relationship with its accepted owners. These different *take* were not always clearly delineated in customary tenure, they were not always the subject of formal arrangements, and they all tended to blend into *take tupuna* over generations, but the Court process forced claimants to put a recognized and formalized label on the source of their rights, especially where their rights were of relatively recent origin.

The way in which title was derived also raised issues as to the scale of fishing rights. As already mentioned, rights based on *take tupuna* could range from the right of a hapū or a group of hapū to substantial fisheries or all of the fisheries in a given area, to the personal rights of individuals (either on their own behalf, or more usually on the behalf of themselves and their immediate household) to participate in these larger fisheries, or to own modest resources such as small eel weirs. Between the rights of the large hapū groups and the rights of individuals also fell the rights of middle-sized groups, the whānau and the small hapū. The fishing rights of communities, or groups defined primarily by common residence rather than common ancestry, are also considered. Because of the concentration of the Native Land Court on the rights of hapū and of individuals, there has been a conscious effort to examine those other types of rights which are poorly represented in the Court records. It rapidly became clear that there were not firm distinctions between, say, the rights of the smaller hapū and the larger whānau, and that the consideration of the scale of fishing rights was tied almost inextricably with issues of property rights and control.

With regard to the issue of ownership rights versus usage rights, the reliance on Native Land Court evidence makes this a fraught problem, as the process of translation has destroyed many of the subtleties of distinction in Māori statements on this matter. Māori grammatical forms of possession do not correspond well with English structures, and the translations of Māori statements on ownership or usage rights in the Court minute books appear to have undergone a considerable degree of formulation. The nature and extent of Māori 'ownership' of land and resources was also a key point of the nineteenth century political debate, and as a result Māori evidence as to the nature of their property rights was often strongly influenced by Pākehā

concerns and terminology. This is countered to a certain extent by the Court's enquiries into both hapū and individual rights, which help to give an indication of how the tribal overright intermeshed with the personal and whānau rights exercised under that overright.

Another area of investigation is the interrelationship between land, waters and fishing rights. Modern research on Māori land tenure and resource rights has emphasized the unity of humanity and the natural world in Māori thought, as compared with Western conceptual divisions between people and their relationships to the land, sea, and freshwater bodies. A number of related issues have been drawn out from the Native Land Court records. These include the potential severability of water-based resources such as fishing rights from rights to the adjoining land, and the use of waterways without a corresponding right to the adjacent land (non-territorial fishing rights) and vice versa; the use of widely-separated fisheries as part of a tribe's seasonal resource round; the use of waterways containing fisheries to mark boundaries between tribes, and the implications for fishing rights in those waters; and the potential for fisheries to be 'let' by their 'owners' to outsiders.

The final major theme of the case studies revolves around the control of the fisheries. Some major aspects of control, such as the relationship between the fishing rights of the hapū and its composite families, and the distinction between ownership and usage rights, have already been mentioned. Other key issues relate more closely to the practical, day-to-day management of the fisheries. These include the role of the chiefs and other persons of authority in controlling access to fisheries, apportioning rights, and managing the resource; the significance of mana for the exercise of fishing rights; the correlation and relationships between those who had control of fisheries and those who had day-to-day use of them; rights to dispose of the fishery or its produce through gifting, trade, and the hosting of feasts; the mechanics of management, such as the implementation of *rāhui* or closed seasons as both a management device and an assertion of fishing rights; and the resolution of fisheries disputes.

There are a number of methodological issues which apply equally to all of the case studies. Perhaps the most important of these is the criteria applied to the selection of evidence from the Native Land Court records. While many different parties often appeared to assert their rights over a particular block and argue their case in the Court, not all of them were usually included in the title to the land by the presiding judge. Of those who were unable to prove their

case to the satisfaction of the judge, it is usually impossible to tell whether this was because their rights were of a type or degree not recognized by the Court as justifying inclusion in a Crown-derived title to the land, or whether it was for the less likely reason that their expression of their traditional rights was grossly exaggerated or even false. Many people who had genuine rights to use resources such as fisheries on a particular block, but who did not live on that land or have corresponding occupation rights, were not included in the title. Therefore it would be unwise to exclude the evidence of non-grantees from consideration, as it may well contain valuable indications of the nature of such non-territorial or seasonal fishing rights. Even in those rare cases where one party did bring what appears to be an indefensible claim, their evidence may also be of value in establishing what Māori considered to be a strong claim to a fishing right. Such weak claims were usually attacked by the other parties on the grounds of inaccuracies in whakapapa and other historical evidence, not on the nature of the fishing right claimed. It could be expected that those putting forward unsupported cases would make sure that the framework of their evidence was strictly orthodox, if the details were open to challenge.[4]

Another important point to be clarified is definition of the 'customary Māori freshwater fishing rights' of the title of this thesis. Throughout this thesis 'customary' has been used in its current legal sense. This carries implications of 'customary law', or the rules governing pre-contact Māori society, and of 'customary title', a legal concept referring to the nature of indigenous property rights held under customary law and to land held in accordance with those property rights. While rooted in pre-contact rules and practices, 'customary rights' are not confined to them. 'Customary rights' includes those rights still exercised in a post-contact environment (even where subject to non-traditional influences) so long as they are founded on custom, and are exercised in a manner consistent with custom and usage. These rights continue so long as they are maintained by Māori, and are not sold or specifically legislated away.[5]

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[4] Others, most notably Allan and Louise Hanson, have taken a similar approach to Māori history sources and their reliability. As they emphasize, "A ... heavily biased story (which transforms the losers of a battle into the victors, for example) can be as valuable as a factually impeccable account so long as it manifests the culturally appropriate narrative structure. Indeed, it might be more valuable because fiction or distortion of events may provide richer ground for the expression of cultural structures than a scrupulously factual narrative". F. Allan Hanson and Louise Hanson Counterpoint in Maori culture London: Routledge and Kegan Paul, 1983, pp.6-7.

[5] See for example *Te Weehi* v *Regional Fisheries Officer* 1 NZLR [1986] 682 at 687-693 per Williamson J; Paul McHugh The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi Auckland: Oxford University Press, 1991, pp.72-78,117-121; New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti of Waitangi Wellington: Law Commission, 1989, pp.8-9,56-

While customary rights may therefore refer to rights exercised from the earliest days of Māori settlement up to the present day, the nature of the sources used in this thesis limits the analysis to customary fishing rights as they were exercised from the late eighteenth to late nineteenth centuries. This was determined by the reliance on the minutes of the Native Land Court as the major source, as the Court investigated ownership of Māori land as at the time of the signing of the Treaty of Waitangi in 1840. Therefore the evidence given to the Court was strongly weighted towards establishing rights as they stood in the few decades leading up to 1840, although in areas where Court cases were not heard until the 1880s and 1890s much evidence also related to the period after 1840. Many events of the more distant past were discussed in the Court, such as migrations and battles, but by and large these afford little understanding of the workings of resource rights. Discussion of fishing rights and practices in the Native Land Court ranged across a period spanning only a few generations into the past, unless there were exceptional events connected with a particular fishery.

The concentration on customary freshwater fishing rights as they were exercised from *circa* 1790 to 1890 is also a reflection of the nature of the oral evidence given to the Court. While oral tradition may record events, motivations and values, it often does not record more subtle and wide-ranging changes in societal structures and ethos. As fishing rights were exercised within this wider social context, it may be expected that these subtle shifts in the exercise of fishing rights have also been reinterpreted in the process of oral transmission. However, as collective memory of the workings of freshwater fishing rights (as expressed in the evidence given to the Native Land Court) appears rarely to have gone back more than a few generations, this does not pose any significant difficulty.

As the analyses of customary Māori freshwater fishing rights found in the second part of this thesis are restricted in the period to which they apply, it must be stressed again that these analyses should not be extended back by default to the entire period of Māori occupation of New Zealand. Māori society was not in stasis prior to 1769, when Captain Cook's first visit began the era of continuous contact between Māori and the West. There was at least one clear cultural shift from the early 'Archaic' culture of the Polynesian settlers to the later 'Classical' culture usually

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59,106,130-143; Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) Wellington: The Waitangi Tribunal, 1988, pp.96-99,208-212,237-238; Waitangi Tribunal The Ngai Tahu Sea Fisheries Report 1992 (Wai 27) Wellington: Brooker and Friend, 1992, pp.154-160,178-179 for usages of 'customary rights', 'customary law' and 'customary title'.

associated with pre-contact Māori, although this change took place at different times in different places throughout the country. Again, some of the shifts in Māori culture from the late eighteenth century onwards appear to have been prompted not only by contact with the West, but also by internal factors such as changing settlement patterns, population movement, and resource shortages.[6] Therefore it is impossible to create a single model of customary fishing rights, and given the limited range of sources for the issue of rights in pre-contact society, some restriction of period is necessary.

While some might argue that an investigation of customary rights should be directed primarily towards pre-contact rights, this is neither possible nor necessary in the case of fishing rights. Many of the basic principles governing fishing rights, such as the close identification of fishing rights with kin groups such as the hapū or whānau, are likely to have been transmitted across time with little mutation. Fishing was one area in which Europeans did not have superior technical knowledge; and some of the areas covered in the case studies, such as the middle and upper Whanganui River, and the Lake Taupō area, were among the last parts of the North Island to come under any appreciable Pākehā control and attract more than the occasional Pākehā settler. The continuing use of traditional fishing practices[7] throughout the nineteenth century, and the survival of some traditional practices into the present day, also demonstrates the proven capacity of Māori fishers to accommodate wider social and cultural change while maintaining the customary basis to their rights.

Finally, some points of usage and orthography should be noted. The word 'tribe' has often been used to cover a wide range of meanings in a variety of contexts. Many earlier writers have applied the term 'tribe' strictly to iwi (autonomous tribal groups, of which there are approximately forty), and used the term 'sub-tribe' or sometimes even 'family' to describe the hapū (smaller groups descended from one common ancestor, usually a descendant of the iwi ancestor).

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6 While these are largely anthropological and archaeological distinctions, see Janet Davidson 'The Polynesian Foundation' in Geoffrey W. Rice (ed.) The Oxford History of New Zealand Second Edition Auckland: Oxford University Press, 1992, pp.9-10,19-22,25-27; and James Belich Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century Auckland: Allen Lane/The Penguin Press, 1996, pp.44-50,56-58,67 for a discussion of these cultural changes.

7 The phrase 'traditional fishing practices' is the most commonly used phrase to describe fishing practices rooted in customary Māori usage, which may or may not utilize later technological adaptations, and so 'traditional' has been preferred to 'customary' in this context.

Some writers have divided the hapū designation further into major and minor hapū, or sub-hapū, as it is common for large hapū to include in turn of a number of smaller associated groups. However, in practice it is often difficult to determine what exactly distinguishes a large hapū from an iwi, or a major hapū from a minor hapū. When discussing issues of political structure and *rangatiratanga*, distinctions in scale can be extremely important, but often when discussing resource rights they are not. Therefore the word 'tribe' has often been used in this thesis to encompass a range of groups from iwi to minor hapū, especially when distinguishing whānau or personal rights from the overright of a larger group which is not always clearly defined. 'Tribe' should also be taken to include communities (groups defined primarily by common residence rather than common descent), unless the context is clearly restricted to kin groups. Hapū too has often been used in a general sense to cover a full range of kin groups including autonomous iwi-like groups, groups of closely-related hapū which routinely acted together, large extended families, and larger groups which share clear kin associations but which did not refer to themselves by a hapū name.

As the nineteenth century minutes of the Native Land Court are all handwritten records of oral evidence, there may be some inconsistencies in the names of people, places, and hapū. Sometimes people were also known in the Court by more than one name, and so some people may appear under different names in the text. Where variant forms occur, one has usually been chosen for use in the text; but for simplicity of reference the footnotes retain the spelling of the original unless an obvious mistake had been made. Macrons have been added to the names of people and places where possible. While whakapapa from the Court records and other published sources have been used to cross-check names and relationships wherever possible, different people often gave different whakapapa and so conclusions drawn from these whakapapa are also open to inaccuracies. I offer my sincere apologies if I have misspelt the names of these *tūpuna* or misrepresented their relationships to each other. On a more general note, Māori words which have been incorporated into standard New Zealand English (such as mana, iwi, tohunga, and pā) have not been italicized; nor have the names of fish and other species. However, all Māori words which feature in the text have been listed in the glossary.

PART ONE

Setting the Context

CHAPTER ONE

Twentieth Century Interpretations of Customary Māori Freshwater Fishing Rights

...we would emphasise to you that Ngai Tahu consider their lands and seas to be a physical and spiritual unity, a seamless whole which cannot properly be divided into parts. Within that unity is our mahika kai, *which cannot be separated from our mana as a Tribe.*[1]

Interest in Māori fishing rights has been reawakened in New Zealand in recent years, especially in political and legal circles. The result has been a reinterpretation of Māori customary freshwater fishing rights, and major changes in the ways in which these rights have been considered. In the judicial arena, the Waitangi Tribunal has examined both customary and modern Māori fishing rights with reference to the provisions of the Treaty of Waitangi, especially in its Ngāi Tahu and Muriwhenua Fishing reports. The work of the Tribunal has been complemented by substantial academic research on fishing rights and wider questions of Māori tenure, and on the effect of Pākehā contact on Māori rights. Legal developments have added another strand to recent interpretations of Māori fishing rights. These tend to draw on points of international and colonial law, especially the doctrine of aboriginal title, and developments in the field of indigenous rights in the United States of America, Canada, and Australia.

Māori scholars have been prominent in the contemporary public discussion of fishing rights and have been heavily involved in all aspects of the Waitangi Tribunal process. This is in contrast to earlier times when public debate on fishing rights was conducted almost exclusively by Pākehā and Māori discussion was confined to the marae, with knowledge of customary rights being passed down privately within families. This discussion and debate amongst Māori continues, out of the general public gaze, and informs much of what is presented to the Tribunal and other bodies. However, as the focus of this thesis is upon Māori expressions of fishing rights in the Pākehā world, it is the public discussion of fisheries, primarily official (which in this context includes legal as well as political or bureaucratic environments) and academic in nature,

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1 Ngāi Tahu Amended Claim in Respect of Fisheries, 25 June 1988, in Waitangi Tribunal The Ngai Tahu Sea Fisheries Report 1992 (Wai 27) Wellington: Brooker and Friend, 1992, p.318

that is concentrated upon. Pākehā observers of fishing rights have always rendered their findings in a manner accessible to other Pākehā, and therefore their conclusions have been used by other Pākehā scholars and officials. On the other hand, until recently the knowledge of kaumātua highly educated and respected in the Māori world has not been accorded the same respect beyond that sphere, and as a consequence has been absent from the general debate.

In marked contrast to earlier debate on Māori tenure and resource rights, fishing has occupied a prominent place in the contemporary discussion, for a number of reasons. Pressures on the extremely valuable commercial sea fishery and the corresponding need for increased regulation of that fishery, coupled with Māori determination that their remaining rights not be eroded further, prompted consideration of the place of Māori in the sea fisheries regime. This led in turn to a re-examination of customary Māori sea fishing rights and practices, Treaty of Waitangi fishing guarantees, and the history of Māori involvement in commercial fishing. With respect to freshwater and tidal fisheries, it has been recognized that Māori have continued to exercise their customary fishing rights in many areas, despite the decline in quality and quantity of the resource. The establishment of the Waitangi Tribunal (with its powers to make recommendations to government) and recent fisheries and environmental legislation has made it easier for Māori to prevent further damage being caused to these fisheries by pollution or 'development'. This has raised the public profile of Māori rights in general, including both historical and surviving Māori fishing rights and practices.

These developments have challenged many established Pākehā preconceptions concerning Māori fisheries. Māori freshwater fishing in particular has been regarded in the past as largely recreational or social in nature. Discussion of fisheries has also usually been subsumed under the general consideration of land tenure and related issues, and to a certain extent still is. However, a number of Tribunal reports have dealt mostly or entirely with waterways, breaking the firm Pākehā connection between fishing rights and land rights, especially in the case of sea fisheries. Freshwater fishing rights are still discussed in connection with rights to surrounding lands, but in a manner which is more consistent with the holistic Māori connection between people, their ancestors, the gods, land, waters, and associated resources. In terms of the Treaty of Waitangi, both land and fishing rights give rise to Article Two claims; that is, contemporary Māori grievances concerning both land and fisheries are usually based on a breach of Article

Two by the Crown. This provision confirms to Māori, "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa", rendered inaccurately in the English version as:

> ...the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.[2]

On the other hand, there is a considerable difference between these rights under the Treaty of Waitangi, and Māori rights under legal principles such as the doctrine of aboriginal title, which has recently been re-introduced into the New Zealand legal system. Treaty rights are largely moral rather than legal, as the courts have traditionally refused to enforce the Treaty unless it is enshrined into statute law. While legal aboriginal rights have a narrower focus, and are usually restricted to the traditional exercise of customary rights, they have been enforceable in the courts against the Crown since 1986. Aboriginal title has already been extinguished over virtually all Māori land, but many freshwater fisheries have not been sold or made the subject of a Crown grant, and so aboriginal title over them remains unextinguished.[3] This gives Māori claimants a legal avenue of redress for some fisheries which does not exist for land.

The contemporary publicly-conducted discussion of fishing rights has arisen out of something of an academic and political vacuum. Fishing rights were little-discussed outside of Māori circles for much of the twentieth century, except in connection with other aspects of Māori society. Many of the ethnographers writing in the early part of the twentieth century wrote about fishing practices, concentrating on the material culture and ritual aspects of fishing. They did not usually discuss the underlying fishing rights, nor the factors influencing changes in fishing between traditional times and the time of writing. Many anthropologists working from the 1920s until the 1970s studied aspects of Māori society related to fishing, but they too looked at other matters such as economic organization or social structure, relegating fisheries to an illuminative role. The highly structured approach of the social anthropologists in particular left little place for

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2 Treaty of Waitangi Act, 1975, First Schedule [English text]; Treaty of Waitangi Amendment Act, 1985, Schedule [Māori text]. Professor Sir Hugh Kawharu has translated this part of the Second Article of the Māori text as: "the unqualified exercise of their chieftainship over their lands over their villages and over their treasures all." — I.H. Kawharu (ed.) Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi Auckland: Oxford University Press, 1989, pp.319-320. There is no mention of forests or fisheries in the Māori version, but they are subsumed under 'taonga'. The meaning of "tino rangatiratanga" is also much stronger than "full exclusive and undisturbed possession".

3 See discussion at page 27 *infra*.

the discussion of the nuances of freshwater fishing rights. In recent times, however, those anthropologists taking a much less formalized approach have contributed a great deal to the debate.

Legal thinkers too did not consider traditional fishing rights for much of the twentieth century. They were hampered by the prevailing doctrine of legal positivism, which held that Māori rights were only enforceable so far as they were included in statute or common law. Thus discussion of Māori rights was conducted entirely in terms of Pākehā law, and revolved around questions such as the ownership of lake and river beds under English tenure, and the place of fishing rights in common law.

In contrast to their invisible place in early and mid-twentieth century debate, fishing rights were much more widely considered in the nineteenth century. Māori land issues were then of great political importance, and Pākehā perceptions of Māori fishing rights were substantially influenced by political considerations. In line with contemporary English thought, fishing and other resource rights were usually only considered as an adjunct to land rights. Most of the debate over Māori land rights revolved around Pākehā concerns, notably the acquisition of land for settlement. Popular points of discussion were alienation rights, the powers of chiefs in land dealings, and the relative position of tribal and individual rights in Māori land.

The establishment of the Native Land Court in 1865, after five years of war in Taranaki, Waikato, Bay of Plenty, and Whanganui, added further to the Pākehā interpretation of fishing rights and land tenure in general. The role of the Court was to investigate the ownership of Māori land, and to grant a Crown-derived title to those it found to be owners. As the Crown also abandoned its right of pre-emption at the time it established the Court, an important part of the Court's work was to guarantee a more secure title to those Pākehā who now purchased land direct from Māori. The Court was required to investigate ownership along customary lines wherever possible, and so heard a vast wealth of material concerning customary tenure from the witnesses who appeared in the Court. Over time, the Pākehā judges of the Court built up a body of case law which had the effect of codifying Māori tenure and imposing a layer of English legal interpretation. The picture of Māori land tenure, and fishing rights, as established by the Native Land Court survived largely intact in Pākehā circles until the late twentieth century.

Contemporary views of Māori freshwater fishing rights

The issue of Māori fishing rights has returned to the public domain in the last twenty years after decades of silence. The investigations of the Waitangi Tribunal have been instrumental in bringing a wide range of Māori land and resource claims, not only fisheries, back into public consideration. Further to this, the present requirement for consultation with Māori at all levels of national and local government has led to the consideration of a wide variety of resource issues from a Māori perspective. These Treaty-based developments have been reinforced by changes in legal perspectives. The courts in New Zealand have begun to consider the Treaty as a moral force in New Zealand law, and have also rediscovered the principles and implications of common law aboriginal title. While these developments are largely related to the enforcement of surviving customary Māori fishing rights (in practice so far mostly sea fishing rights) against the Crown and general Pākehā interests, discussion of them has required an examination of the nature of such customary rights.[4]

This new environment, where the investigation and settlement of Māori grievances is publicly accepted, has arisen out of the Māori cultural renaissance and a renewed public awareness of the Māori presence in New Zealand. While in the early and mid-twentieth century tribal kaumātua had waged private paper wars with Pākehā officialdom, methods changed from the late 1960s onwards, and there were more radical and public demonstrations of anger from aggrieved Māori. In terms of national exposure, protest culminated in the Land March or Hīkoi of 1975, the occupation of Bastion Point in Auckland in 1977-1978 and of the Raglan golf course in 1978, and the Springbok Tour of 1981. These were the first indications for many Pākehā that there was anything wrong with New Zealand's mythically good race relations record, and that not all Māori grievances were buried in the past.[5]

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4 Waitangi, pp.xi-xvi; New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi Wellington: Law Commission, 1989, pp.60-67; Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) Wellington: The Tribunal, 1988, pp.190-195. An example of such explanatory material for local government is Te Maire Tau, Anake Goodall, David Palmer & Rakiihia Tau Te Whakatau Kaupapa: Ngai Tahu Resource Management Strategy for the Canterbury Region Wellington: Aoraki Press, 1990

5 I.H. Kawharu Maori Land Tenure: Studies of a changing institution Oxford: Oxford University Press, 1977, p.vii; I.H. Kawharu 'Mana and the Crown — a marae at Orakei' in Waitangi, p.212; W.H. Oliver Claims to the Waitangi Tribunal Wellington: Department of Justice, 1991, pp.8-10; Andrew Sharp Justice and the Māori Auckland: Oxford University Press, 1990, pp.4-12; Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim (Wai 9) Wellington: The Tribunal, 1987, p.106; Waitangi Tribunal The Te Roroa Report 1992 (Wai 38) Wellington: Brooker and Friend, 1992, p.280

The Waitangi Tribunal was established by the government to respond to Māori demands that the Treaty of Waitangi be honoured. Under the Treaty of Waitangi Act 1975, the Tribunal was constituted with the powers of a commission of enquiry and given the task of examining any breaches of the Treaty which had taken place since the passing of the legislation. Claims could be brought by any Māori who felt that he or she had been, or would be, prejudicially affected by any actions or omissions of the Crown. Once a claim was brought, the Tribunal was to consider legislation, proposed legislation, regulations, policies and other acts or omissions of the Crown. If a claim was found to be well-founded the Tribunal could then make recommendations to the government as to appropriate forms of compensation or resolution. As it turned out, the restriction of the Tribunal to contemporary breaches did not stop the Tribunal considering the historical background, even if it could not make recommendations based upon those findings. The Crown's performance was to be assessed against Treaty principles, rather than its actual terms, as the terms of the English and Māori versions diverge in a number of respects. The development of these Treaty principles has been a feature of ongoing Tribunal reports. Only a few claims were submitted under this legislation, but when the scope of the Tribunal was widened in 1985 to allow historical claims dating back to 1840, sizeable claims flowed in from all around the country.

The Waitangi Tribunal mostly considers territorial claims filed by iwi, hapū, or groups of related tribes, and thus evidence usually relates only to the impact of Crown actions on those people and areas. There have however been some pan-Māori claims such as the radio frequencies, *te reo* (Māori language), and electoral options claims. The findings in the territorial cases have referred mostly to the circumstances of the claimants rather than seeking to draw conclusions which can be applied to all cases. Under the guidance of the Tribunal chairperson, Chief Judge Durie of the Māori Land Court, the Tribunal has also moved away from a formal legalistic Pākehā method of hearing claims. Now, it hears evidence in a manner appropriate to the witnesses, so that claimants' grievances are usually heard on the marae, under marae *kawa*, and in the language witnesses are comfortable with. This allows kaumātua and others to deliver their knowledge in a more traditional manner, and the interactive rather than adversarial process allows evidence to be discussed fully and common ground to be reached more readily than in more formalized legal proceedings. This process has been facilitated by the considerable Māori

membership of the Tribunal itself, with about half the total membership of the Tribunal being Māori.[6]

The Tribunal has considered Māori fishing rights in a number of its reports since its inception — the very first claim to the Tribunal was brought by Joseph Hawke and others of Ngāti Whātua over fisheries regulations and the taking of shellfish. The most comprehensive of these reports have been the Muriwhenua Fishing Report of 1988 and the Ngāi Tahu Reports of 1991-92, while many others have dealt with aspects of fishing in less detail.[7] A number of cases relating to waters were brought under the original legislation, but while they referred to contemporary grievances the Tribunal also looked at customary fishing rights, as the claimants stated they had never ceded these rights. Common themes in many early claims relating to fisheries, and the subsequent reports, include the cultural importance of fisheries to Māori and the ecological principles which governed their management, compared with the damage done to water resources by Pākehā.[8]

A feature of Tribunal reports has been the adoption of the language and concerns of the claimants. As the Tribunal investigates specific claims laid by Māori, it has been the claimants who have set the agenda and focus for the investigation in the first instance. As a result the reports of the Tribunal reflect Māori themes and concepts far more than earlier judicial investigations of Māori rights. For example, the Muriwhenua tribes claimed strong property rights in their claim filed in 1986:

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6 Waitangi, p.xi; Paul McHugh The Māori Magna Carta: New Zealand law and the Treaty of Waitangi Auckland: Oxford University Press, 1991, pp.309-321; Oliver, pp.10-17,74-81; Sharp, pp.74-77,125-140,167-177; M.P.K. Sorrenson 'Towards a Radical Reinterpretation of New Zealand History: the role of the Waitangi Tribunal' in Waitangi, pp.160-163,171

7 Waitangi Tribunal Report of the Waitangi Tribunal on a claim by J.P. Hawke and others of Ngati Whatua concerning the fisheries regulations (Wai 1) (2nd ed.) Wellington: The Tribunal, 1989; Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) Wellington: The Tribunal, 1988; Waitangi Tribunal Ngai Tahu Report 1991 (Wai 27) Wellington: Brooker and Friend, 1991; Waitangi Tribunal The Ngai Tahu Sea Fisheries Report 1992 (Wai 27) Wellington: Brooker and Friend, 1992

8 Waitangi Tribunal Report of the Waitangi Tribunal on the Waiau Power Station Claim 1978 (Wai 2) 2nd ed. Wellington: The Tribunal, 1989, pp.7-10; Waitangi Tribunal Report of the Waitangi Tribunal on the Motunui-Waitara Claim (Wai 6) 2nd ed. Wellington: The Tribunal, 1989, pp.7-9; Waitangi Tribunal Finding of the Waitangi Tribunal on the Manukau Claim (Wai 8) Wellington: Government Printer, 1985, pp.54-55; McHugh The Māori Magna Carta, pp.317-319; Oliver, pp.18-28; Sharp, pp.31,142-146

> That exclusive title to and possession and use of the harbours, sea coasts, on-shore and off-shore fisheries ... are and should be recognised as among the Taonga of the claimants and given effect by legislation and administrative arrangements.

The amended Ngāi Tahu sea fishery claim of 1988 also mentioned inland fisheries, and emphasized:

> Ngai Tahu consider their lands and seas to be a physical and spiritual unity, a seamless whole which cannot properly be divided into parts. Within that unity is our *mahika kai*, which cannot be separated from our mana as a Tribe.... The Ngai Tahu fishery includes all property and user rights inherent in the business and activity of fishing within their tribal waters...

The Te Roroa claim filed in 1990 included amongst its points the "[f]ailure to recognise Te Roroa Tino Rangatiratanga over the Waipoua River" and "[f]ailure to protect Maori traditional fisheries in Taharoa". Similarly, the Mohaka River claim of Ngāti Pāhauwera, dated 1991, opened with the statement: "The Mohaka River ... is a taonga of Ngati Pahauwera in respect of which, pursuant to the Treaty of Waitangi, Ngati Pahauwera is guaranteed tino rangatiratanga by the Crown.... The fisheries in the Mohaka River are taonga of Ngati Pahauwera." Thus the Tribunal has discussed many claims to fishing rights and *mahinga kai* in terms of *tino rangatiratanga* and mana, and has considered resources as *taonga*.[9]

The reports of the early waterways cases raised points which were to become central to later debates, but the implications were not discussed at this stage. In the Kaituna case of 1984, the Tribunal found, "the Kaituna River [was] owned and had ... been owned for many generations by the Ngati Pikiao sub-tribe and the Te Arawa". The Motunui-Waitara Report of 1983 and Manukau Report of 1985 attributed customary ownership of various parts of the Taranaki reefs and the Manukau Harbour respectively to the several hapū and marae of those areas.[10] These reports also made tentative steps towards describing what the 'ownership' of waters entailed in Māori custom. In the case of the Kaituna River, the Tribunal stated, "...these traditional rights of ownership [carried] with them the free and uninterrupted right to fish the

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9 Muriwhenua Fishing Report, p.246; Ngai Tahu Sea Fisheries Report, pp.318-319; Te Roroa Report, pp.302-303; Waitangi Tribunal Mohaka River Report 1992 (Wai 119) Wellington: Brooker and Friend, 1992, p.85; Waitangi Tribunal Te Whanganui-a-Orotu Report 1995 (Wai 55) Wellington: Brooker's, 1995, pp.220-222,228-230

10 Waitangi Tribunal Report of the Waitangi Tribunal on the Kaituna River Claim 1984 (Wai 4) 2nd ed. Wellington: The Tribunal, 1989, p.31; Manukau Report, pp.54,71; Motunui-Waitara Report, p.7; Sorrenson 'Towards a Radical Reinterpretation', pp.166-169

river, the estuary and the sea, together with the use and enjoyment of the flora adjacent to it."[11] The Tribunal did not discuss the implications of this statement for ongoing Māori rights over waterways, although it does imply that fishing rights were traditionally an incident of the 'ownership' of the associated body of water.

The precise nature of Māori 'ownership' of lands, waters, and fisheries was a theme that continued to be developed by the Tribunal in subsequent reports. The Manukau Report of 1985 continued to speak in terms of 'ownership' of land and water, but its explanation of 'ownership' was clearly narrower than the usual legalistic Pākehā meaning of that word:

> They own no more than a right to use and enjoy the fruits of the land and water. They hold them in trust for their children, and their children's children after them. They cannot sell or destroy the rights of future beneficiaries, but have a duty to pass them on in at least as good a condition as they received them.[12]

This described the limits placed on traditional Māori 'owners' of fishing waters but went no further towards clarifying the details of their 'right to use and enjoy the fruits'.

Given the context of the Tribunal's work, the continued use of the language of 'ownership' is probably an expression of traditional Māori rights as they ought to have been enforceable against Pākehā interests, rather than an assertion that Māori interests in fishing were analogous to Western ownership. Other concepts used by the Tribunal to describe Māori fishing rights include the possession of a right to control, a right to use and enjoy, a right to access, or simply an interest. These interpretations have been more common in Tribunal reports than expressions of outright ownership.[13]

In the Mohaka River Report of 1992, the Tribunal adopted a clearer terminology to describe the various rights customarily exercised over the Mohaka River. At the lowest level are the "limited use rights" of small groups, above which are the "proprietorial rights" of the hapū over fishing areas and materials such as *pā tuna*. These are subject in turn to "rangatira rights" or the rights of control and protection vested in the *rangatira* of the wider tribe. Thus the

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[11] Kaituna Report, p.31

[12] Manukau Report, p.103

[13] Waitangi Tribunal The Fisheries Settlement Report (Wai 307) Wellington: Brooker and Friend, 1992, p.13; Manukau Report, p.103; Mohaka River Report, pp.15,23; Muriwhenua Fishing Report, pp.35-37,181; Ngai Tahu Report, pp.181,840; Te Roroa Report, p.13

Tribunal found that the river "was owned by" the iwi (Ngāti Pāhauwera) rather than its composite sub-tribal groups, which had "defined use rights".[14]

By the time of the Pouakani Report of 1993, the Tribunal had reached a concise view of the extent of resource rights:

> The land and its resources was not "owned" by Maori in the sense that it was property, a disposable commodity that can be bought and sold. Maori people occupied land in extended kin groups, whanau and hapu, under a system of inter-locking and overlapping rights of use (usufructuary rights).[15]

These rights of use were derived in a number of ways, the most common being *take tupuna* (ancestral right) and *take raupatu* (conquest). These two sources of title tended to mingle over time through intermarriage; both needed to be validated by *ahi kā roa* ('long-burning fires') or continual occupation or use of the land and its resources.[16]

The Tribunal has usually regarded rights over waters and fisheries in the same way, and the possible separability of the use of a fishery from rights over the containing waters or surrounding land has not been widely examined.[17] One analogous situation which has been considered is the separation of the tribal overright from usufructuary rights exercised by the tribe's smaller constituent groups, as expressed above in the Mohaka case. The Tribunal found in the Muriwhenua case in 1988 that, "some fisheries are patently connected to the land, and in particular the fisheries associated with swamps, streams, ponds and foreshores. That the larger rivers, lakes and seas were differently seen, is apparent in certain Parliamentary petitions."[18] The

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[14] Mohaka Report, pp.15-16,19,23,47. The terminology of the three types of rights was developed by claimant researcher Graham Butterworth.

[15] Waitangi Tribunal The Pouakani Report 1993 (Wai 33) Wellington: Brooker and Friend, 1993, pp.13-14. See pages 22-23 and note 55 *infra*.

[16] Ngai Tahu Report, p.175. See also Manukau Report, p.21; Orakei Report, pp.12-13; Pouakani Report, p.14; Te Roroa Report, p.5; George Asher and David Naulls Maori Land Wellington: New Zealand Planning Council, 1987, pp.5-7; Kawharu Maori Land Tenure, p.56; Manatū Māori/Ministry of Māori Affairs Customary Māori Land and Sea Tenure Wellington: Manatū Māori, 1991, pp.19-20; Nganeko Minhinnick Establishing Kaitiaki Auckland: [Resource Management Law Reform], 1989, pp.1-3; Ann Parsonson He whenua te utu (The price will be land) unpublished PhD thesis, University of Canterbury, 1978, pp.71,99; Douglas Sinclair 'Land: Maori View and European Response' in Michael King (ed.) Te Ao Hurihuri — Aspects of Maoritanga (2nd ed.) Auckland: Reed Books, 1992, p.65; Te Whakatau Kaupapa p.3-11; Alan Ward A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand Auckland: Auckland University Press, 1973, p.6

[17] Fisheries Settlement Report, p.12; Mohaka Report, p.15; Muriwhenua Fishing Report, pp.xiii,37,179,198; Ngai Tahu Sea Fisheries Report, pp.xvi,318; Te Roroa Report, p.49. This approach has also been taken by other related works, *e.g.* Customary Māori Land and Sea Tenure, p.3; Te Whakatau Kaupapa, pp.3-13,3-15

[18] Muriwhenua Fishing Report, pp.207-208

fact that the Tribunal and Māori claimants do see large bodies of water as separable from land can be seen from the production of reports dealing with claims specifically related to the Kaituna and Mohaka Rivers, and the Whanganui River claim is currently under consideration.

Questions of ownership and property rights have raised the issues of chiefly authority and mana, especially as the drafters of the Treaty chose the phrase *tino rangatiratanga*, derived from the word *rangatira* meaning chief, to describe customary Māori property rights, authority and control. The greatly respected kaumātua John Rangihau of Tūhoe gave an explanation of mana and *rangatiratanga* which stressed that recognition by the people was a very important element in chieftainship, as *rangatira* assumed their position by virtue of such recognition of their leadership qualities and birth. In Te Rangihau's words, "rangatira was people bestowed". This democratic element of *rangatiratanga* minimized the separation between the *rangatira* and the general people. This common touch distinguished the true *rangatira*, who addressed all their people as chiefs themselves, "confirming the view that the authority embodied in that concept [*rangatiratanga*] is also the authority of the people."[19]

Mana has many shades of meaning, depending on context, and most modern writers have clearly delineated between *mana tangata*, or authority over people as exercised by *rangatira*, and *mana whenua* or authority over land (or sea in the case of *mana moana*). Te Whakatau Kaupapa (Ngāi Tahu's resource management plan for Canterbury) sees *mana whenua* as a tribal attribute, describing it as, "the political and occupational authority over a particular area, usually defined by natural boundaries. The verbal expression of a Tribe's manawhenua typically refers to dominant physical features such as mountains, rivers and lakes."[20] The mana of the *rangatira* was intricately linked with this *mana whenua*. The mana of the tribe was also firmly connected to the food-producing capabilities of the lands and waters, and to ancestral connections.[21]

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[19] Orakei Report, p.133. See also Angela Ballara The Origins of Ngāti Kahungunu unpublished PhD thesis, Victoria University of Wellington, 1991, pp.349-350; Kawharu Maori Land Tenure, pp.61-62; Te Roroa Report, pp.5-6,171; Ward A Show of Justice, p.6

[20] Te Whakatau Kaupapa, p.3-10. See also 'Amended Claim in Respect of Fisheries 25 June 1988' in Ngai Tahu Sea Fisheries Report, p.318

[21] Cleve Barlow Tikanga Whakaaro: Key Concepts in Māori Culture Auckland: Oxford University Press, 1991, pp.60-62; Api Mahuika 'Leadership: Inherited and Achieved' in Te Ao Hurihuri, pp.45,54-55; Maori Marsden 'God, Man and Universe: A Maori View', ibid. pp.118-121; Minhinnick, pp.1-4; Margaret Mutu 'Cultural Misunderstanding or Deliberate Mistranslation?' Te Reo 35 (1992): 57-103, pp.61-62; Waerete Norman 'The Muriwhenua Claim' in Waitangi, p.201; Parsonson He whenua te utu, p.70; Te Whakatau Kaupapa, pp.3-10, 3-12; Manukau Report, p.55; Muriwhenua Fishing Report, pp.180-181,207; Ngai Tahu Sea Fisheries Report, p.41; Te Roroa Report, pp.13,49-50,171

The Waitangi Tribunal's Muriwhenua Fishing Report of 1988 was the first to raise a number of key issues in relation to fisheries throughout New Zealand, not just one specific area. Although the fisheries report resulted from a claim put in by the five tribes of the Muriwhenua region in the Far North, the nationwide fisheries aspects were heard ahead of the full Muriwhenua land claim in 1986. This was because of the introduction of legislation at that time to create individual transferable quotas (ITQ) under a Quota Management System (QMS) for commercial fisheries, which effectively created private property rights in the offshore fishing resource.[22] Thus the report focussed particularly on the property rights associated with fisheries, especially aspects such as trade which had direct relevance to the ITQ system. It included a comprehensive account of the range and complexity of customary Māori fishing interests, and charted their decline upon Pākehā appropriation of the fishery.

The report gave a strong kinship focus to these property rights: "The key to Maori ownership is not survey definitions but kinship." Resources were not owned in the European sense, but rather stayed within the tribe.[23] The Tribunal used the simplified pyramidical model of kinship arrangements to explain fishing rights, with the lands and waters generally making up the tribal or iwi property. The hapū controlled larger resources such as *pātaka* (storehouses), eel weirs, large fishing canoes and some fishing grounds. Whānau had control over smaller weirs, canoes, and fishing grounds; and while "they did not formally 'own' the fishing grounds and beds, at least their prior rights of use were respected", within the overright of the hapū and tribe. Individuals might have similar rights to those of a whānau but this was much less common.[24] Particular fisheries were not associated with locations (such as marae) as well as hapū in the way that they were in the Manukau Report and the later Ngāi Tahu Report.[25]

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22 Muriwhenua Fishing Report, pp.xi,xiv-xv,xx,45-52,140-150,200; Mataitai, pp.17-20; McHugh The Māori Magna Carta, pp.319-320; Oliver, pp.29-37; Sharp, pp.81-85,154-155

23 Muriwhenua Fishing Report, pp.198,230. See also Ministry of Agriculture and Fisheries Kaitiaki o Kaimoana: Treaty of Waitangi (Fisheries Claims) Settlement Regulations — A Discussion Paper Wellington: The Ministry, 1993, p.9

24 Muriwhenua Fishing Report, pp.35-36,198; Oliver, pp.34-37; Sorrenson 'Towards a Radical Reinterpretation', pp.174-176

25 Manukau Report, pp.54-55,71; Ngai Tahu Sea Fisheries Report, pp.xvi,41

The claimant perspective suggested a more complicated picture of affiliations, rights, and derivation of title as applied to fisheries.[26] Waerete Norman wrote of the different aspects to title:

> Where, in the pre-European period the physical dimension of title, *mana whenua*, was secured by the principle of 'ahi kā' (keeping the fires of occupation burning), *mana tupuna*, on the other hand, was the mana to lands, harbours, rivers, beaches, forests, and fisheries inherited through and validated by ancestors. Whakapapa (genealogy), therefore, was the determining factor; the tupuna conferred title to resources and a sense of permanency on successive generations. They owned the land and all that went with it; the sea was joined to the land, the whole was their natural heritage.... In Muriwhenua, although some fishing grounds were shared with neighbouring groups, there was no confusion about the right to invite a group to share.[27]

She also wrote of overlapping iwi boundaries and resource cycle areas resulting from the '*whānaungātanga*' or inter-relationships of neighbouring peoples, although resource areas themselves were usually closely demarcated.

The Ngāi Tahu Report of 1991 and the subsequent Ngāi Tahu Sea Fisheries Report of 1992 took a different approach to the kin-based analysis of fishing rights. One of the 'nine tall trees' of the Ngāi Tahu claim was the loss of their *mahinga kai* through the failure of the Crown to set out sufficient reserves, as agreed to in the 1848 deed of the Kemp purchase (which covered much of Canterbury and Otago), and through the actions of settlers in destroying resources.[28] While finding in passing that various resources such as eel channels and rat runs were divided into *wakawaka* which "belonged to" hapū and sometimes whānau,[29] these reports were much more concerned with the inter-relatedness and unity of Māori resource rights. The very use of the term *mahinga kai* (which the Tribunal defined as 'places where food is procured or produced', and included sea fisheries as well as land-based resources) implied an integrated view of food

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[26] See Muriwhenua Fishing Report *passim*; and Norman, especially pp.200-202,205-209 for a useful précis of Muriwhenua practices and attitudes. Similar outlooks were expressed by the claimants in the Whanganui River claim to the Waitangi Tribunal, who spoke in terms of a complexity within unity which did not lend itself well to Pākehā legal notions of ownership and occupation — see Closing Submission of Counsel for the Claimants, Whanganui River Claims, Waitangi Tribunal document Wai 167 #D-18, pp.13-14

[27] Norman, pp.201-202

[28] Ngai Tahu Report, pp.8-10,149-150; Ngai Tahu Sea Fisheries Report, pp.313-315; Harry C. Evison (ed.) The Treaty of Waitangi & the Ngai Tahu Claim: A Summary Christchurch: Ngai Tahu Maori Trust Board, 1988, pp.41-45; Tipene O'Regan 'The Ngāi Tahu Claim' in Waitangi, pp.253-254

[29] Ngai Tahu Report, pp.39,156,198,856-857,863,875

resources as something different from simple land rights. Witnesses before the Tribunal drew on a traditional Māori holistic approach, and spoke not only of links between different types of food resources, but also of a physical and spiritual connection between people, the land and waters, and their resources.[30]

Issues of control over resources in the Ngāi Tahu *rohe* (tribal area) were considered in some depth by the Tribunal, as they had also been in Muriwhenua. It found that various mechanisms were implemented to reinforce the conservation ethic. Permission to exploit *mahinga kai* had to come from the hapū and *rangatira* holding mana over the area, but its general management was in the hands of those who had rights in it. The Tribunal found that as the fish were the children of Tangaroa they "were not owned as property"; rather, the tribe exercised its *rangatiratanga* over the resource by catching the fish. The report quoted James Russell, who said:

> ...an elaborate set of rules, restrictions and guidelines were enforced, often by means of quasi-religious concepts such as "tapu", "rahui", "utu", and "muru" to ensure that resources were indeed maintained as appropriate for community needs, resource management, or "rakatirataka" or "kaitiakitaka".

Rāhui and tapu in particular were applied by the *rangatira* and tohunga (a term which denotes an authority in any field with talents granted by the gods, and is not confined to spiritual expertise) of the community.[31]

Other modern commentators on Māori control of resources have elaborated on the processes of control. They have said that while there was no concrete set of laws, all aspects of behaviour were governed by a set of accepted values, particularly *utu* or reciprocity. Deviation from these values would be punished by either the gods or the community. With regard to the control of marine fisheries, a Ministry of Agriculture and Fisheries discussion paper said, "The rules were simply known."[32] The system was flexible and pragmatic, and responded easily to and

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30 ibid. pp.151-152,842; Ngai Tahu Sea Fisheries Report, pp.xvi,87,318,390. See also Asher and Naulls, pp.3-4; O'Regan 'The Ngāi Tahu Claim', pp.234,253-254; Muriwhenua Fishing Report, pp.177-181; Closing Submission of Counsel for the Claimants, Wai 167 #D-18, pp.9-10

31 Ngai Tahu Report, pp.856,880; Ngai Tahu Sea Fisheries Report, p.87; Manukau Report, p.54; Mohaka Report, p.16; Muriwhenua Fishing Report, pp.33,36,198,230; Te Roroa Report, pp.13,227; Kawharu Maori Land Tenure, pp.58,62; Customary Māori Land and Sea Tenure, p.3; Marsden, pp.128-130; Minhinnick, pp.11-13; Ann Parsonson 'The Expansion of a Competitive Society: A Study in Nineteenth-Century Maori Social History' NZJH 14 (1980); 45-60, p.50; Sinclair, p.65; Te Whakatau Kaupapa, pp.3-12,3-14,3-15,4-13. 'Rakatirataka' and 'kaitiakitaka' are southern Ngāi Tahu dialect for 'rangatiratanga' and 'kaitiakitanga'.

32 Kaitiaki o Kaimoana, p.9; see also Muriwhenua Fishing Report, p.230; Joan Metge New Growth from Old: The Whānau in the Modern World Wellington: Victoria University Press, 1995; p.21

quickly incorporated changes in societal values and organization. While the ultimate right of occupation might be dependent on sufficient military force to maintain it, this did not negate the existence of a set of generally accepted values which were normally observed.[33] The existence of common values did not mean that disputes never occurred, but where they did so, local experts drew on their historical knowledge of the occupation and boundaries of the area in question to debate the problem, sometimes under impartial mediation.[34]

Another aspect of control over resources was the right to gift or grant land or *mahinga kai*, known as *take tuku*. This has often been considered by the Tribunal and other commentators as part of the package of property rights, especially as the terms of early gifts from Māori to Pākehā (for schools, hospitals and other institutions) were often misunderstood and these transactions have now been put before the Tribunal. Various writers have recorded that gifts of land or resources were often made to a person from an outside tribe who married into the community, but these would revert to the donor group in a generation or two as the children of the union inherited the rights, or the gift reverted on the death of the original grantee. Usufructuary rights might also be gifted as a dowry in important political marriages. All such gifts made for a specific purpose (in this case, the support of a migrant member of the community) returned to the donors when the conditions were no longer being fulfilled.[35]

Gifts of fishing rights could be made on a much larger scale, as discussed in Ngāi Tahu's claim to the Waitangi Tribunal:

> Ngai Tahu alone has the authority to give, and to revoke, fishing rights to manuhiri peoples coming into our rohe. We have in fact granted such rights since ancient times, which we call *tuku whenua* or *tuku moana*.... Any such grants are exercised under the mana of Ngai Tahu and have always been protected by us from intrusion by others ... and equally may be revoked by us for good cause.[36]

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33 'The Maori Land Courts: Report of the Royal Commission of Inquiry' AJHR 1980 H-3, p.30; Kawharu Maori Land Tenure, p.63; Customary Māori Land and Sea Tenure, pp.18,26; Parsonson He whenua te utu, p.48; Ward A Show of Justice, pp.4-5,8

34 Kawharu Maori Land Tenure, p.60; Customary Māori Land and Sea Tenure, pp.14-18; Parsonson 'The Expansion of a Competitive Society', p.57; Parsonson He whenua te utu, pp.66-67,99; Ward A Show of Justice, p.9

35 'The Maori Land Courts', p.30; Kawharu Maori Land Tenure, p.62; Customary Māori Land and Sea Tenure, pp.18-22,28; Mutu, pp.60-62; Sinclair, pp.68-69; Orakei Report, p.2; Pouakani Report, p.14. See pages 188-189 *infra*.

36 Ngai Tahu Sea Fisheries Report, p.321. See also Muriwhenua Fishing Report, p.230

Others have written that these gifts of lands or resource areas might be made for a number of reasons, such as to provide redress and balance losses after warfare or other disputes, to fulfil an obligation, or to bind people even closer together. Whatever the circumstance of the gift, the authority to bestow it rested solely with those who held the *mana whenua*.[37]

The Tribunal and others have found that whānau or hapū might also gift produce from the land to neighbouring groups, not only as an expression of goodwill and as insurance against needing help in the future, but also as an expression of their usage right over the resource. If the gift was not challenged, their usage right was confirmed. The making of a gift increased the mana of the donors as well as honouring the recipients. It put the recipients under some obligation to respond, creating an ongoing relationship and obligations between the parties.[38]

The Tribunal's Ngāi Tahu Reports extended its practice of defining Māori rights by means of Māori terms and concepts. This practice reflects both the substantial Māori presence on the Tribunal itself, and the Māori influence on the Tribunal's agenda through the presentation of claims and evidence in a much more traditional manner than was allowed by earlier judicial proceedings. As an example of the new use of Māori terminology, Māori control of *mahinga kai* has been expressed as an aspect of the *kaitiakitanga* (stewardship or guardianship) of resources rather than possession in the Western sense. This was reflected in the right of the tribe and its authority figures to override the controlling role of the immediate proprietors if the interests of the wider group were at stake. Guardianship was a necessary corollary of the strong linkages between the people and the land, and *kaitiaki* were responsible to past and future generations as well as the present one. Tribunal reports and other modern writings have stressed the role of various tāngata whenua groups as *kaitiaki* of their own *taonga*.[39]

The Fisheries Settlement Report of 1992, which followed the Sealord deal whereby Māori claims to commercial fisheries under the Treaty were exchanged for a large commercial

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37 Customary Māori Land and Sea Tenure, pp.20-21; Mutu, pp.62,68; Parsonson He whenua te utu, p.105; Sinclair, pp.68-69; Orakei Report, p.23; Te Roroa Report, p.24

38 Customary Māori Land and Sea Tenure, pp.15,20-22,27; Parsonson 'The Expansion of a Competitive Society', p.57; Te Whakatau Kaupapa, p.3-11; Muriwhenua Fishing Report, pp.50-52; Orakei Report, p.23; Te Roroa Report, pp.47-48; Waitangi Tribunal Report of the Waitangi Tribunal on the Waiheke Island Claim 1987 (Wai 10) 2nd ed. Wellington: The Tribunal, 1989, p.6

39 'The Maori Land Courts', pp.29-30; Kawharu Maori Land Tenure, p.61; Minhinnick, *passim*; Te Whakatau Kaupapa, pp.3-11,3-16,4-15,5-40; Manukau Report, pp.10,54; Muriwhenua Fishing Report, pp.179-183; Ngai Tahu Report, p.880; Waitangi Tribunal Ngawha Geothermal Resource Report 1993 (Wai 304) Wellington: Brooker and Friend, 1993, *passim*; Pouakani Report, p.272

stake, raised particular issues of consent and control relating to fisheries. The report remarked that most involved in the fisheries settlement process had assumed consent for dealings concerning the sea fisheries would come from the iwi, but the Tribunal found that local fisheries were largely "associated with" hapū. Even within this attribution of rights to hapū, it spoke of smaller composite groups and the wider iwi also having "interests" in the fishery. The report further qualified the association with hapū by discussing the range of interests involved in Māori fishing, such as the ownership of an eel weir by a single family or the joint ownership of a sea-fishing ground by several hapū. The mutability and flexibility of the hapū as a social unit, and the implications of this for consent and consultation, were also discussed.[40]

The theme of the fluidity of hapū structure and affiliation was also considered in the Te Roroa Report of 1992, with the Tribunal finding that hapū were in a process of continual splintering, regrouping, and intermarriage, with chiefs exercising an important role in maintaining the viability of the group. Thus in many areas there were numerous closely related hapū with overlapping interests. The Tribunal quoted from descriptions Te Roroa people gave of their hapū rights and affiliations. A leading Te Roroa *kuia*, Raiha Paniora, described the Te Roroa hapū as "resembling the mange-mange vine", and added "we are all inextricably tied together, both by tupuna and intermarriage". Dr Pat Hohepa also told how his hapū rights and affiliations changed depending on what part of the district he was in, with some people in the community belonging to a number of hapū in the one district.[41]

Atholl Anderson also discussed the issue of hapū structure as it related to southern Ngāi Tahu, whose social organization was different to that of the North Island iwi because of their extremely low population density and the different resources available in the southern climate. Nevertheless, Anderson came to many of the same conclusions about hapū structure as writers examining the North. When he investigated the wide range of hapū affiliations given to early census-takers in the southern South Island, he found that, "The different degrees of integration expressed to the European census takers may thus reflect Maoris perceiving the question 'What is your hapu?' as something like, 'By what right are you in this place?' " He found that those Māori spoken to at their major winter camp tended to give the name of the larger descent group,

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[40] Fisheries Settlement Report, pp.5-6,12-13. See also page 20 *infra*.

[41] Te Roroa Report, pp.5,7. See also Customary Māori Land and Sea Tenure, p.16; Ngawha Geothermal Report, p.14; Orakei Report, pp.12-13

while those spoken to at the scattered summer resource-gathering areas gave the names of minor hapū or even whānau.[42]

Other contemporary anthropologists have also emphasized the flexibility of Māori kin relationships and the rights based on these relationships. Dame Joan Metge's recent work on the modern whānau contains a reappraisal of the classical rigid model, which saw whānau, hapū, and iwi as discrete units stacking together neatly into larger groups, each fulfilling a different economic function. Unlike earlier writers, who saw whānau as growing into small and then large hapū, she wrote that groups would splinter when they became unmanageably large or there were disagreements, but that "[w]hether or not these new whānau combined to establish themselves as a hapū depended on their having not merely the numbers but also effective leadership, adequate resources and the fighting capacity to defend their independence." The whole concept of whānau and hapū was flexible and rhetorical, depending upon the situation and context.[43] In its 1996 preliminary report on the Taranaki claim, the Waitangi Tribunal has extended kinship flexibility to the blurred boundaries between iwi and hapū. It even uses the term 'hapū' to refer throughout to 'tribes', not 'sub-tribes':

> ...because hapu were the main social units of traditional Taranaki society. 'Hapu' may refer both to a single hapu and to a combination of hapu, thus Ngati Te Whiti is a hapu of the Te Atiawa (group of) hapu. A combination of persons, however, may also be called an iwi ('the people') and today, hapu combinations are regularly so called.[44]

The Tribunal and other commentators have found that this fluidity extended the range of rights available to individuals, through the wide network established by the connections between closely-related hapū and the inheritance of rights from both parents. Within the limits of *ahi kā*, or the need to keep rights alive through regular use, people could choose to exercise their rights with any descent group that they chose to associate with, so long as it recognized them as one of that group. While each person had the potential to inherit an interest in all the rights of their parents and grandparents, in practice other conditions such as occupation and use would

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42 Atholl J. Anderson 'Towards an Explanation of Protohistoric Social Organization and Settlement Patterns Amongst the Southern Ngai Tahu' NZJA 2 (1980): 3-23, pp.8-12. See also O'Regan 'The Ngāi Tahu Claim', pp.238,261

43 Metge New Growth from Old, pp.35-37,44-45

44 Waitangi Tribunal The Taranaki Report: Kaupapa Tuatahi: muru me te raupatu = the muru and raupatu of the Taranaki land and people (Wai 143) Wellington: GP Publications, 1996, p.1 n.2

determine that not all potential rights would become actual rights. Most writers hold that these associations could lie dormant for three or four generations before becoming *mātaotao* or cold, although there was no stipulated length of time for this process.[45]

The Tribunal has considered freshwater fishing rights in a piecemeal fashion, with successive reports building on and developing the matters discussed in earlier hearings, and a strongly iwi-based focus to most of its deliberations. Others, especially government departments involved with Māori fishing, have sought to provide a more cohesive outline of customary Māori freshwater fishing rights which often provide a useful summary of contemporary research and understanding. An example is the general overview of customary land and sea tenure produced by Manatū Māori in 1991. This was produced as a précis of the material included in the ministry's database of information on customary tenure (mostly excerpts from Waitangi Tribunal evidence, early Native Land Court records and other official documents), for the use of those dealing with natural resource rights and Treaty issues.

This Manatū Māori report stressed the expression of "rights of use" or "access" rather than "ownership rights", as that language "better fits the modern anthropological and sociological understanding of traditional Maori land tenure practices".[46] It distinguished between three sources of title — *take tupuna*, *take raupatu*, and *take whenua tuku*, all of which were handed down the generations so long as "sustained by occupation and use". Other elements in the maintenance of title were the strength to resist encroachment, the ability to utilize the resources of the land, and a knowledge of the history and whakapapa relevant to the land and the *take* on the land. Conquests, where claimed as a *take*, had to be to the complete exclusion of the defeated party. Otherwise the remnant group kept its rights warm, even when reduced to the status of *taurekareka* or 'slaves'.[47]

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[45] Ron Crocombe has also noted that most Pacific tenure systems were much more clear on how rights could be gained rather than how they could be lost or allowed to lapse — Ron Crocombe (ed.) Land Tenure in the Pacific (3rd ed.) Suva: University of the South Pacific, 1987, pp.2-3,14-17. See also Anderson, pp.10-11; Kawharu Maori Land Tenure, p.39; Kaitiaki o Kaimoana, p.9; Customary Māori Land and Sea Tenure, pp.18,28; Te Whakatau Kaupapa, p.3-11; Alan Ward 'Alienation Rights in Traditional Maori Society: A Comment' JPS 95 (1986): 259-265, p.260; Muriwhenua Fishing Report, pp.181,198,230; Ngai Tahu Report, p.863; Orakei Report, pp.12-13; Pouakani Report, p.13; Te Roroa Report, p.7; Waiheke Report, p.27

[46] Manatū Māori Customary Māori Land and Sea Tenure Wellington: Manatū Māori, 1991, p.4

[47] ibid. pp.14-22,24-25

According to this report, "[t]he rights of individuals of access to a resource existed only as a part of the rights of their whanau, which in turn were part of those of the hapu or the iwi." Rights were allocated from the top downwards, and the rights of individuals were reallocated to children, or other whānau members, on the death of the individual. While these allocations were usually peaceful, some resources were fought for. The rights of those who went to live with a different hapū through marriage were "circumscribed" and eventually relinquished, except in the case of chiefly marriages where a dowry might be given.[48] While finding for the existence of "individual rights", the report explained that these were exercised "as a sub-set of whanau rights", utilized for the benefit of the wider whānau rather than the individual. The extent of the interests of each whānau would take into account its needs, and would always be seen within the "overall right of the whole body of descendants to the area in its entirety." Many large-scale resource-gathering activities would require the cooperation of, and be of benefit to, this wider group.[49]

Another more recent overview of customary fisheries was produced by Manatū Māori's successor Te Puni Kōkiri to assist iwi in dealing with their involvement in the management of customary fisheries, which gained new protection under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. This booklet dealt not with establishing where rights lay, but concentrated much more on basic issues of management, control, and sustainability.[50] As the key Waitangi Tribunal fishing reports had done, this booklet stressed the inter-relationships of nature:

> For Māori, a kinship exists between all elements of the natural world, of which people are one. This Māori world view has traditionally been brought to the management of all natural resources, including fisheries. It is reflected in protocol, rituals and regulations.

Basic conservation principles were discussed, such as not mixing or contaminating the *mauri* or life-forces of incompatible water types, and not polluting waterways with human waste. This conservation ethic was related to the mana of the people, as their ability to exchange fish with other communities and to demonstrate *manaakitanga* or hospitality was tied up with the health and richness of the resources available to them. In the discussion of traditional authority

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[48] ibid. pp.17-18,28

[49] ibid. pp.23-24,27-28

[50] Te Puni Kōkiri/Ministry for Māori Development Ngā Kai o te Moana: Kaupapa Tiakina — Customary Fisheries: Philosophy and Practices, Legislation and Change Wellington: Te Puni Kōkiri, 1993. See also pages 16-17 *supra*.

structures, the importance of the *mauri* of the fishery and the role of the *atua* (gods) was placed alongside the role of the people in control.[51]

The booklet laid out an overview of traditional management structures and practices. It found that rights to the sea were treated no differently than rights to the land, and fishing areas were clearly defined and boundaries often marked. Fisheries were "community-owned", under the authority of the *rangatira* — usually the *rangatira* of the hapū, but some fisheries were under the authority of the *rangatira* of the iwi or the marae. As well as the role of the *rangatira*, it was found that, "amongst the people who used a given resource, there were individuals who 'watched over' the resource. Known as *kaitiaki*, they were considered custodians of that resource and regulated its access on behalf of the whānau, hapū and iwi." It was these *kaitiaki* who actually controlled the fishery on a day-to-day basis, through the imposition of tapu and *rāhui*, or restrictions to prevent overfishing or the gathering of polluted fish. The breach of tapu or *rāhui* carried spiritual sanctions, backed up where necessary by community action against offenders.[52]

Contemporary views of freshwater fishing rights revolve around the different levels of participation and control of the various groups involved in the fishery. The old model of land and resource rights drew heavily on English concepts of tenure, and posited defined descent groups communally owning set territories, within which the people making up the group had various but similar rights to exploit resources. Many writers who have examined property rights and their application in both Western and non-Western cultures have characterized these communal rights as common property rights. These are rights in land and resources where the members of a limited and defined group shares equal access and use rights in a particular resource, and so differ from public property rights where access is open to all. The holders of common property rights have a right to exclude others from the resource, and a right to control it, but individuals do not have a right to transfer or alienate their interests. These rights are gained through affiliation to the appropriate landholding group, and are determined by that group's criteria of affiliation and allocation of rights, rather than being strictly hereditary.[53]

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[51] ibid. pp.7-10,14-18

[52] ibid. pp.10-14,18-19

[53] Ron Crocombe has provided a useful summary of the classification of the basic principles of tenure systems, especially those in Oceania, which outlines the terminology of different categories of land rights — 'An Approach to the Analysis of Land Tenure Systems' in Henry P. Lundsgaarde (ed.) Land Tenure in Oceania

The current model of Māori fishing rights retains the principles of common property rights or tribal 'ownership', but definitions of what constitutes a tribe (especially a hapū) are much less rigid. While generally finding that most of the property and control rights in fisheries were vested in hapū, commentators have given much wider definition to that term. Proprietorial and day-to-day control rights over fisheries have been attributed to the hapū holding *mana whenua* or *mana moana*, and its *rangatira* and *kaitiaki*. Yet, for the purposes of identifying the primary controlling group, the term hapū has been stretched to apply to anything from extended families owning an eel weir to large groups of hapū owning extensive fishing grounds. Over-arching the hapū right was the iwi right of protection and ultimate responsibility. Within the hapū right were the use rights of the individual whānau who actually utilized the resource.

Most recent commentators, both Māori and Pākehā, have found that Māori rights over lands, waters and resources are not the same as Western forms of full property ownership, such as freehold. This recognition that Māori tenure cannot be compared easily with Western forms of tenure is however complicated by the fact that any discussion of Māori rights in English will require the use of terms drawn from Western principles, to provide a conceptual framework and basis for analysis.[54] Explained in terms of property rights, those who have a fishing right under Māori custom have full rights of usage and control, but they have no right to dispose of it as a mere commodity, or to wilfully damage it. The strong links between land and the kin-group impose a responsibility of *kaitiakitanga* or stewardship, with the land and its resources held in trust for following generations.

Pākehā commentators in particular have often used the language of usufructuary rights to reflect the differences between customary Māori title and the more comprehensive rights implied by ownership in a full Western legal sense. Usufruct is a legal concept, drawn from Roman rather than common law. Its original meaning was a trust or life interest granting the

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Honolulu: The University Press of Hawaii, 1974, pp.4-16; see also S.V. Ciriacy-Wantrup and Richard C. Bishop ' "Common property" as a concept in natural resources policy' Natural Resources Journal 15 (1975):713-727, pp.714-716; W.H.R. Curtler The Enclosure and Redistribution of our Land Oxford: Clarendon Press, 1920, p.77; Bonnie J. McCay and James M. Acheson 'Human Ecology of the Commons' in Bonnie J. McCay and James M. Acheson The Question of the Commons: the culture and ecology of communal resources Tucson: University of Arizona Press, 1987, pp.7-8

[54] This use of analytical property rights terms is particularly common in comparative studies of tenure systems from an anthropological, legal or economic perspective. For example, tenure in Oceania has been characterized by Henry P. Lundsgaarde as an "absence of fee simple ownership" and a "presence of entailed family estates" —Lundsgaarde, p.vii; such language is common throughout many works on the property rights and concepts of non-Western peoples.

right to use and profit from a property, so long as its substance was not altered or damaged. The term has been modified slightly in its application to the property rights of non-European peoples. In this context it amounts to full possession with the right to exclude others, and is superior to a simple right of occupation and use, while falling short of full ownership or freehold because there is not a free right of transfer.[55]

Customary Māori fishing rights in a contemporary legal context

The work of the Waitangi Tribunal and many other commentators and researchers has sought to establish what rights were customarily exercised by Māori over their freshwater fisheries. The Tribunal has then assessed the loss of these customary rights (that is, rights held under *tikanga Māori*) against the provisions of the Treaty of Waitangi. The Treaty is a moral rather than legal force in New Zealand, as it has been held that treaties made between colonizing powers and indigenous peoples are not enforceable in the courts unless incorporated in statute law.[56] The courts do, however, offer another path to the resolution of Māori claims, through what is known as the doctrine of aboriginal title. In essence, this common law doctrine holds that the property rights of indigenous peoples continue under colonial administration until deliberately and equitably extinguished by purchase or cession. These principles were incorporated in the Treaty through the guarantee of Māori property rights and the Crown right of pre-emption, and thus the Treaty stated existing Māori property rights under English colonial law rather than creating new rights. While aboriginal title is primarily of importance to Māori today in enforcing their remaining fishing rights against the Crown, it is an important thread of the contemporary debate

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[55] Some legal writers also refer to the similar common law concept of profit à prendre, or inheritable right to go onto property and remove something of value, as an analogy for aboriginal rights in fisheries. Peter A. Cumming and Neil H. Mickenberg (eds) Native Rights in Canada (2nd ed.) Toronto: The Indian-Eskimo Association of Canada, 1972, p.40; Wm. B. Henderson 'Canada's Indian Reserves: the Usufruct in our Constitution' Ottawa Law Review 12 (1980): 167-194, pp.167-168,172-173; P.G. McHugh 'Constitutional Theory and Māori Claims' in Waitangi, p.51; Elinor Ostrom 'Institutional Arrangements for Resolving the Commons Dilemma: Some Contending Approaches' in McCay and Acheson, p.252; Anthony D. Scott 'Conceptual Origins of Rights Based Fishing' in Philip A. Neher, Ragnar Arnason and Nina Mollett (eds) Rights Based Fishing Dordrecht: Kluwer Academic Publishers, 1989, p.18; Peter J. Usher and N.D. Bankes Property, the Basis of Inuit Hunting Rights — A New Approach Ottawa: Inuit Committee on National Issues, 1986, pp.8-9,25-28,47-49,60-69

[56] R.P. Boast 'Treaty rights or aboriginal rights?' NZLJ January 1990: 32-36, p.33; Frederika Hackshaw 'Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi' in Waitangi, p.115; Mataitai, pp.54-56; McHugh 'Constitutional Theory', pp.50-51; McHugh The Māori Magna Carta, pp.176-178; P.G. McHugh 'The role of law in Maori claims' NZLJ January 1990:16-20, p.16

surrounding the extent of customary Māori fishing rights. It should be said at this point, however, that many Māori claimants are extremely wary of basing their contemporary claims on either the Treaty or common law aboriginal title, because of the implication that their rights are dependent on Pākehā recognition and principles.[57]

The broader doctrine of aboriginal rights (aboriginal title refers only to the property rights of indigenous peoples) has its origins in European, especially Spanish, legal thought of the fifteenth and sixteenth centuries, and has long been incorporated in English colonial common law. A basic principle of early European colonial forays into occupied lands was that colonial government must have a guardianship function, and be of benefit to the indigenous peoples. Early British policy in North America was that Native American customary title (their form of tenure under their own legal systems), other property rights and traditional laws must be observed, so far as they were not repugnant to the common law. The common law, which settlers took with them to their new homes, requires that all title to lands must be derived from the Crown, in which the ultimate title rests. While the Crown gained the underlying title to new lands by virtue of colonization, this 'radical' title was subject to (or 'burdened' by) the rights of the indigenous occupiers, towards whom the Crown had a fiduciary duty.[58]

These property rights under the doctrine of aboriginal title were incorporated in and affirmed by the Royal Proclamation of 1763, which dealt with most of the eastern seaboard of Canada and the United States. It ruled that all Native Americans under British protection were not to be disturbed in possession of those lands and hunting grounds which they had not sold or ceded. It also reserved to the Crown the right to purchase Native American land, implicitly recognizing their right to sell and be regarded as legitimate owners. This right of pre-emption, as

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57 See for example Affidavit of Tipene O'Regan, 19/4/1991, Ngāi Tahu Claim, Waitangi Tribunal document Wai 27 #AA-12, pp.34,41-42; Closing Submissions of Counsel for the Claimants, Wai 167 #D-18, p.8

58 For a fuller explanation of aboriginal title and its origins, see *passim* Peter Blanchard 'Pakeha Perspectives on the Treaty: Legal Perspectives' in New Zealand Planning Council Pakeha Perspectives on the Treaty [Wellington]: New Zealand Planning Council, [1989]; Hackshaw; P.G. McHugh 'Aboriginal Title in New Zealand Courts' Canterbury Law Review 2(2) (1984): 235-265; McHugh The Māori Magna Carta; McHugh 'The role of law in Maori claims'; Brian Slattery Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title [Saskatoon]: University of Saskatchewan Native Law Centre, 1983

it was known, was another important facet of the doctrine of aboriginal title. This Proclamation is still in force in Canada and is the guarantee of many Native American and Inuit rights.[59]

These principles survived the American Revolution and were later given clear expression by Chief Justice Marshall in the United States Supreme Court. In the landmark 1823 case *Johnson* v *M'Intosh* he surveyed centuries of colonial law, and recognized, "the absolute title of the crown subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right". Native American title to their lands continued even where the government had made no grant, and thus the government had to obtain title to Native American lands by valid purchases or cessions before granting title to the lands to its own citizens. Later legal commentators, drawing on Marshall's judgments, have found that this 'native title' was analogous to a usufructuary right burdening the radical title of the Crown.[60] This seems to be what some Māori signatories understood of the provisions of the Treaty, if the words of Nopera Panakareao are anything to go by: "Ko te atakau o te whenua i riro i a te Kuini, ko te tinana o te whenua i waiho ki ngā Māori."[61]

The body of colonial law, including Marshall's findings, was carried to New Zealand with the establishment of Crown colony government and the adoption of common law. It is clear from an early Supreme Court judgment (*R.* v *Symonds* in 1847) that the doctrine of aboriginal title was observed in the early stages of New Zealand's legal development. This case revolved around the temporary waiver of pre-emption by Governor FitzRoy in 1844. In finding the waiver illegal, Chief Justice Martin and Justice Chapman referred to the principles of 'native title' (Marshall's term for the rights included in the common law doctrine of aboriginal title), and found it was cognizable by the courts. While they found that this common law native title was somewhat inferior to estate in fee simple (freehold), because Māori could sell only to the Crown,

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[59] McHugh 'Aboriginal Title', p.258; Kent McNeil Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada [Saskatoon]: University of Saskatchewan Native Law Centre, 1983, p.2; Slattery Ancestral Lands, p.6; Brian Slattery The Land Rights of Indigenous Canadian Peoples, as affected by the Crown's acquisition of their territories D.Phil thesis, University of Oxford, 1979, pp.208-209,217,270,312,324-328

[60] *Johnson* v *M'Intosh* 8 Wheaton 543. See also *St. Catherine's Milling & Lumber Co.* v *The Queen* [1888] 14 App. Cas. 46 [Canada]; *Amodu Tijani* v *Secretary, South Nigeria* [1921] 2 A.C. 399 at 408 per Viscount Haldane; Hackshaw, pp.98-99; Henderson, pp.168-169; McHugh 'Aboriginal Title', pp.240-243,258; McHugh The Māori Magna Carta, pp.106-108; Slattery Ancestral Lands pp.17-36; David V. Williams 'Te Tiriti o Waitangi — Unique Relationship Between Crown and Tangata Whenua?' in Waitangi, p.88

[61] "The shadow of the land is to the Queen, but the substance remains to the Māori." Nopera reversed his statement a mere year later. Claudia Orange The Treaty of Waitangi Wellington: Allen & Unwin, 1987, pp.82-83

practical purposes it gave "full enjoyment of the land" and "a legal title akin to ownership". Therefore the Crown had to extinguish native title, with free Māori consent, before a Crown grant could be issued; both for legal reasons and to protect Māori from the consequences of an open market for land.[62]

Much of the contemporary debate over the application of this doctrine of aboriginal or native title has not been concerned with its nature, but rather the conditions under which it can be deemed to have been extinguished. The consensus is that there must have been a deliberate act for this to have taken place, such as fair purchase or specific legislation, but opinion is divided over whether there must be compensation for legislative extinguishment. 'Acts of state', such as conquests made in the process of establishing the colony, are also seen as a recognized procedure of extinguishment. Only the Crown or state has the right to actively extinguish native title, but title can also be extinguished by default if the land or resources are abandoned by the indigenous people.[63] In New Zealand, the operation of the Native Land Court served to extinguish both native title (the common law rights of Māori) and customary title (the rights of Māori under customary tenure or *tikanga Māori*) over much Māori land as it became subject to a Crown-derived title. The Native Land Act 1909 completed the process by stipulating that "Native customary title to land" was not enforceable against the Crown or in the courts with regard to "customary land" (that which had passed through the Native Land Court but was still held under Māori custom). Despite some qualifying provisions this prevented Māori from bringing their property rights before the courts.[64]

The aspects of common law aboriginal rights discussed thus far refer to the possession of land. There is another aspect of these aboriginal rights more relevant to fishing rights which is

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[62] *R.* v *Symonds* [1840-1932] NZPCC 387; Blanchard, pp.52-53; Hackshaw, pp.102-109; Mataitai, pp.114-115; McHugh 'Aboriginal Title', pp.242-245; McHugh The Māori Magna Carta, pp.108-113; Slattery Ancestral Lands, pp.39-44

[63] Blanchard, pp.54-56; Boast, pp.32-34; Cumming and Mickenberg, pp.42-44; P.G. McHugh 'The Legal Status of Maori Fishing Rights in Tidal Waters' VUWLR 14 (1984): 247-273, pp.266-270; McHugh The Māori Magna Carta, pp.138-143; Slattery Land Rights of Indigenous Canadian Peoples, pp.26-30,328

[64] Native Land Act, 1909, ss.84-86; Blanchard, pp.55-56; McHugh 'Aboriginal Title', pp.250-251,261-265; McHugh The Māori Magna Carta, pp.80-81,138-140; McHugh 'The role of law in Maori claims', pp.18-19. See Chapter Three The Pākehā Framework — The Native Land Court Machinery on the variable legal status of land after passage through the Native Land Court.

concerned with the use made of lands and waters under indigenous custom, and which is often referred to as non-territorial aboriginal rights. Common law aboriginal title over land includes the right to hunt and fish, and lands used for hunting and fishing but not occupation are included under common law aboriginal title. If these hunting and fishing rights continue to be exercised, they are maintained as legally enforceable aboriginal rights under the doctrine. Unlike common law aboriginal title to land, which amounts to ownership in all but name, the extent of non-territorial aboriginal rights has been restricted by the courts. They apply to personal and customary use only, not full-scale modern commercial exploitation, and the exercise of the right must also be undertaken in a customary context and culturally appropriate manner. Judge Taylor found in *Ministry of Agriculture and Fisheries* v *Love* in 1988 that the defendant had taken undersized lobster with the intention of selling at least some of them. However, he acquitted him because he found that there was a commercial element to customary Māori fishing rights, and "there was sufficient compliance with the customary law of the local Maori by the defendant to be acceptable to Maori custom."[65]

In New Zealand, these common law aboriginal fishing rights would be restricted to the group which had *mana whenua* in pre-contact times and continued to use the resources of the area up to the present day.. The sale of the land would be no bar to proving a non-territorial aboriginal right providing use of the resource had continued. Like land title, common law aboriginal rights and customary rights can be legislated away or purchased, and can also be restricted by regulations. This type of non-territorial right is common in Canada, where Native Americans and Inuit are exempted from many game regulations so long as they are hunting or fishing for their personal use.[66]

As virtually all land in New Zealand is no longer 'burdened by' common law aboriginal title, it is these common law non-territorial aboriginal rights and their implications for ongoing Māori fishing practices which have resurfaced in the courts. Paul McHugh has suggested that aboriginal title has not been extinguished over tidal lands in New Zealand, and by extension the non-territorial aboriginal right to fish over such lands would remain unimpaired.[67] It would seem

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[65] *Ministry of Agriculture and Fisheries* v *Love* 1988 DCR 370

[66] Blanchard, pp.54-56; Mataitai, pp.137-141; McHugh 'Legal Status of Maori Fishing Rights', pp.247-248,256-261,271-273; McHugh The Māori Magna Carta, pp.138-143; McNeil, pp.3-8,22-23,32-35,53,61-62; Usher and Bankes, pp.47-48

[67] McHugh 'Aboriginal Title', p.265; McHugh 'Legal Status of Maori Fishing Rights' *passim*

that the Crown has consistently recognized a customary property right of fishery in larger bodies of water such as lakes. Fishing rights were purchased in both Lakes Wairarapa and Taupō to allow the government to exercise a full regulatory role over the lakes as a whole.[68] As with land rights, by purchasing these fishing rights the Crown has acknowledged the right of the vendor to sell, and it would follow that where not purchased these rights remain intact.

Despite the applicability of common law non-territorial aboriginal title to the New Zealand situation, New Zealand courts have been highly reluctant to recognize Māori fishing rights until very recently. This disinclination arose in part from the wording of successive Fisheries Acts which included a saving clause protecting "existing Maori fishing rights". The courts found this to be equivalent to Treaty rights, as there was no other legislative provision for Māori fishing rights, and therefore declined to enforce them as the Treaty had no legal force. However, in the last decade or so the courts have found that these clauses in the legislation have preserved whatever rights remained under customary and common law aboriginal title.[69] These legislative interpretations of the courts drew heavily on the academic research of Paul McHugh into the doctrine of aboriginal title and legal practices in similar post-colonial jurisdictions. Coupled with the growing acceptance of the Treaty of Waitangi as a living document, this new direction in judicial thought created a legal avenue by which Māori could bring common law aboriginal title arguments on fishing rights before the courts.

The first fishing case in which aboriginal title was successfully argued was *Te Weehi* v *Regional Fisheries Officer*, before the High Court in Christchurch in 1986. In this case Tom Te Weehi appealed against his conviction under the 1983 Fisheries Act for possessing undersized pāua on the grounds that he was exercising a common law non-territorial aboriginal fishing right. Justice Williamson accepted this argument, but emphasized that such rights were narrow, and only enforceable where being exercised in accordance with customary law. The right did not extend to commercial exploitation or the breach of a *rāhui*. Being a non-territorial right, it did not matter that the adjoining land had passed from Māori ownership, as local Māori had continued to

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[68] See pages 193-196,198,284-286 *infra*.

[69] Fisheries Act, 1908, s.77(2); *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 682 at 688; Boast, p.34; McHugh 'Legal Status of Maori Fishing Rights', pp.262-265

use the fishery. In this case Te Weehi, of Ngāti Porou from the East Cape region of the North Island, had sought permission to fish from a local kaumātua of Ngāi Tahu, which has a strong historical relationship with Ngāti Porou. This fulfilled his customary obligation to fish only with the approval of the group in charge of the fishery. In his judgment, Justice Williamson drew on the research of McHugh, Waitangi Tribunal reports, and early cases such as *R.* v *Symonds* which were sympathetic to aboriginal title.[70]

Subsequent cases have extended further the legal recognition of Māori fishing rights. The landmark *Maori Council* case of 1987 did not refer directly to fishing rights or aboriginal rights, but did recognize the principles of the Treaty of Waitangi as binding on the Crown. An uncertain interim judgment by Justice Greig in *Ngai Tahu Maori Trust Board* v *Attorney-General* (which was concerned with the questions over the Quota Management System raised by the Muriwhenua claim in the Waitangi Tribunal) found that there was a commercial element in customary fishing by Ngāi Tahu and others, and that while there had been a diminution in the exercise of this right since 1840, it had not been specifically taken away. Thus the guarantee of Māori fishing rights contained in the Fisheries Act 1986 served to protect Māori customary commercial interests, and prevented the implementation of the QMS. In *Ministry of Agriculture and Fisheries* v *Love*, it was also found that commercial use was protected under this section of the 1986 Act so long as the fishing was done in accordance with Māori rights. Under joint pressure from Māori leaders and the findings of both the Waitangi Tribunal and the general courts, the government responded with the Māori Fisheries Act 1989, which included references to the recognition of Treaty rights and guaranteed a certain proportion of the total allowable catch for Māori fishing interests. This recognized that Māori could not be denied a share of the property rights in fish, which had been created under the new régime.[71]

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[70] *Te Weehi* v *Regional Fisheries Officer, passim*; Blanchard, pp.53-54; Boast, pp.34-36; Hackshaw, pp.115-116; Mataitai, pp.10,57-59; P.G. McHugh 'Aboriginal title returns to the New Zealand Courts' NZLJ February 1987: 39-41, p.39; McHugh The Māori Magna Carta, pp.130-132,142-143

[71] *The New Zealand Maori Council and Latimer* v *Attorney-General and Others* [1987] 1 NZLR 641; *Ngai Tahu Maori Trust Board* v *Attorney-General* unreported CP 559/87, High Court Wellington, 2/11/1987; *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188; *Ministry of Agriculture and Fisheries* v *Love* [1988] DCR 370; *Ministry of Agriculture and Fisheries* v *Pono Hakaria and Tony Scott* unreported, CRN 8031003482 - 3, District Court Levin, 19/5/1989; Boast, pp.33-36; Hackshaw, pp.116-117; Waitangi, pp.xi-xii; Mataitai, pp.7,12,58-59,66-67,92-96; McHugh 'Constitutional Theory', pp.48-53; McHugh The Māori Magna Carta, pp.19-21,142-143,247-277; Sharp, pp.80-85,167-177

The Court of Appeal, while recognizing the existence of common law aboriginal title, put limits on its applicability in the *Te Runanganui o Te Ika Whenua Inc Society* v *Attorney-General* case of 1993, where it found that aboriginal title did not apply to such modern concepts as hydroelectricity generation.[72] In a case brought by Ngāi Tahu in the High Court in 1993 to maintain their monopoly over the whale watching tourist operation at Kaikōura, Ngāi Tahu argued that irrespective of their Treaty rights they had "an aboriginal or indigenous right to control access to the resource, which right at common law survived the signing of the Treaty of Waitangi and has never been taken away from them since." However, Justice Neazor found that under both Treaty principles and "non-territorial aboriginal title" there was only a limited development right for resources in customary use. He also found that any putative exclusive right available to Ngāi Tahu under this doctrine was limited by the conservation legislation in force over the whales. The Court of Appeal found that Ngāi Tahu had "pitched too high" in claiming an exclusive right under the Treaty or aboriginal rights to a modern tourism asset, although they were entitled to have their interests protected by the Crown given their traditional use of whales as an economic resource.[73]

As well as advancing the development of the law, the judgments affirming common law aboriginal rights have also given status to the Treaty as a living document and an interpretive aid in considering the provisions of legislation affecting Māori rights. The findings of the *Maori Council* case in particular complement the obligation of the Waitangi Tribunal to consider Treaty principles rather than provisions in the investigation of claims. This was further developed in a later judgment from the Privy Council in London in the *The New Zealand Maori Council* v *Attorney-General* (Te Reo Māori) case, which stated that these principles "include, but are not confined to, the express terms of the Treaty.... the 'principles' which underlie the Treaty have become much more important than its precise terms."[74]

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[72] *Te Runanganui o Te Ika Whenua Inc Society* v *Attorney-General* [1994] 2 NZLR 20

[73] *Ngai Tahu Maori Trust Board* v *Director-General of Conservation*, unreported CP 841/92, pp.18-21,28-32; *Ngai Tahu Maori Trust Board* v *Director-General of Conservation* [1995] 3 NZLR 553 at 554-555,559-561. Whales occupy an interesting but undeveloped place in New Zealand common law because of a 1910 Supreme Court case, *Baldick* v *Jackson* 30 NZLR 343. Chief Justice Stout found that an ancient English law, under which whales were 'royal fishes', was not applicable in New Zealand because "it would have been impossible to claim [that part of Royal prerogative] without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with" (at 344-345).

[74] *The New Zealand Maori Council* v *Attorney-General* [1994] 1 NZLR 513 at 513,517; see also McHugh 'The role of law in Maori claims', p.17

The place of fishing rights in early to mid-twentieth century scholarly discussion

The resurgence of interest in customary Māori land tenure and fishing rights in recent times followed a long period of marginalization of the subject. For much of the twentieth century, discussion of customary freshwater fishing rights has been confined to the academically-oriented work of ethnologists and anthropologists. Their interest in fishing rights as a theme of its own was limited, although their research on related topics such as social and economic organization has influenced the recent debate on fishing rights. This academic approach lodges between the highly political and legal discussion of much of the nineteenth century, and the similar resurgence of interest in the late twentieth century. Fishing rights, and land tenure in general, lessened in political importance towards the end of the nineteenth century, as almost all Māori land had been converted to a Crown-derived title by 1900 — either by purchase or confiscation by the Crown prior to 1865, or through the operation of the Native Land Court from 1865. In 1919, only about 7.5% or just over two million hectares of New Zealand land remained in Māori ownership. A tiny proportion of this was *papatipu* or customary land, which had not passed through the Native Land Court; while about 60% of all Māori-owned land (usually the best quality parts) was leased out to Pākehā.[75] Therefore political and legal interest in Māori land shifted to issues of management and incorporation rather than investigation of title.

With official attention elsewhere, the picture of Māori land and resource rights presented in much of the twentieth century was based almost entirely on the work of ethnographers and anthropologists, both professional and amateur. While much more academic in nature than most nineteenth century writing on Māori land and fishing rights, their works do not provide a balanced picture of traditional resource rights. The ethnographers (especially the most prominent and productive of their number, Elsdon Best) tended to concentrate upon the material and ritual aspects of Māori culture, in an attempt to preserve what they could of what they perceived as a rapidly changing and dying way of life.[76] The ethnographers concentrated on remaining examples

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[75] 'The Maori Land Courts', p.24; see also Asher and Naulls, pp.40-41

[76] Michael Reilly 'An Ambiguous Past: Representing Maori History' NZJH 29 (1995): 19-39, p.27; M.P.K. Sorrenson Manifest Duty. The Polynesian Society over 100 years Auckland: The Polynesian Society, 1992, pp.3,21,24; M.P.K. Sorrenson Maori Origins and Migrations: The genesis of some Pakeha myths and legends Auckland: Auckland University Press, 1979, p.27

of traditional Māori fisheries, observed in fieldwork, and discussed this alongside material relating to pre-contact practices, often without clearly distinguishing between the two. They did not make connections between these remaining examples of traditional fishing practices, which they assiduously recorded, and the rights under which the fishing took place. Neither did they comment upon the loss of these rights due to Pākehā encroachment upon waterways, nor help Māori in their battles against the loss of their rights. The view that the fishing practices they observed represented the last dying examples of traditional Māori fisheries pervaded their work.

Most of the early ethnographers were men who had developed a lay interest in Māori society and then extended their knowledge through their employment and the opportunities that this gave them to undertake fieldwork. For example, S. Percy Smith was a surveyor (and later Surveyor-General) who thus worked closely with Māori when determining the boundaries of blocks to be brought before the Native Land Court; while Elsdon Best served with the Armed Constabulary at Parihaka before becoming a mediator and health inspector amongst the Tūhoe people of the Urewera district from 1895 to 1910. No observers of this time saw the conflict between their work as agents of the settler government — the policies of which did so much to destroy traditional Māori society — and their research. Many of the New Zealand-born scholars (both amateur and professionally-trained) had also had the benefit of contact with Māori society from an early age, or were part-Māori themselves. Best's biographer said that at the age of seven he announced his ambition to become a Māori tohunga, so as to be better able to catch eels.[77]

Articles dealing with matters of ethnographical interest (especially concerning Māori material culture) had been published occasionally in the Transactions of the New Zealand Institute from 1868 onwards. The Journal of the Polynesian Society, more specifically directed towards the ethnographical and anthropological interests of the Society's members, was first published in 1892. As the name suggests, it published material relating to the entire Polynesia region, but given its New Zealand base Māori material featured strongly. Its editors were also keen on receiving and publishing material, especially oral traditions, from Māori kaumātua as well as from Pākehā scholars.[78]

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[77] E.W.G. Craig Man of the Mist. A biography of Elsdon Best Wellington: A.H. & A.W. Reed, 1964, p.13. Reilly has said of Best's time in Taranaki, "Colonial subjugation and the acquisition of Maori knowledge were never so closely twinned." — Reilly, p.24

[78] Sorrenson Manifest Duty, pp.18,24-34,145

The early ethnographers were almost all lacking in formal academic training (anthropology was not taught in English universities until the 1890s), and based their work largely on long contact with Māori. Elsdon Best became New Zealand's first professional ethnographer in 1910, when he was employed by the Dominion Museum. He published bulletin after bulletin from the Museum covering various aspects of Māori society and material culture, including his Fishing Methods and Devices of the Maori, first published in 1929. J. Herries Beattie undertook similar ethnographic fieldwork for the Otago University Museum Ethnological Project of 1920, although much of his most valuable work on the traditional lifestyle of the South Island peoples, particularly Kāi Tahu, was not published for seventy years.[79] Other ethnographers of this period who wrote about fishing rights, however briefly, include T.W. Downes, known for his involvement with Te Whatahoro (the part-Pākehā scribe who had written down the teachings of the Wairarapa tohunga Te Matorohanga) and later for his vast knowledge of Māori in the Whanganui region; and Rev. H.J. Fletcher, who wrote about the Taupō area. Most of the tribal histories published in the mid-twentieth century included material about fishing, and many other local historians included material of an ethnographical nature in their sections on the Māori occupation of their subject district.[80]

The ethnographical work undertaken in the early part of this century differs from later anthropological work in that it tends to record and report rather than to interpret. Elsdon Best in particular was renowned for the richness of detail found in his work (Sir Apirana Ngata once said of him, "it may be doubted whether he has the gift of condensation") and his reluctance to generalize. It was this encyclopædic knowledge that earned him the reputation amongst his peers as the most knowledgeable authority, Māori or Pākehā, on Māori tradition.[81] The historical

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79 James Herries Beattie (ed. Atholl Anderson) Traditional Lifeways of the Southern Maori Dunedin: University of Otago Press, 1994

80 T.W. Downes History of and Guide to the Wanganui River Wanganui: Wanganui Herald Newspaper Company, 1921; T.W. Downes Old Whanganui Hawera: W.A. Parkinson, 1915; H.J. Fletcher 'The Edible Fish, &c., of Taupo-nui-a-Tia' Transactions and Proceedings of the New Zealand Institute 51 (1918): 259-264. The tribal histories include John Te H. Grace Tuwharetoa — The History of the Maori People of the Taupo District Auckland: Reed, 1959; Leslie G. Kelly Tainui Wellington: The Polynesian Society, 1949; D.M. Stafford Te Arawa — A History of the Arawa People Auckland: Reed, 1967. For the methodology and limitations of these works see Ngahuia Te Awekotuku He Tikanga Whakaaro: Research Ethics in the Maori Community Wellington: Manatū Māori, 1991, pp.12-13; Reilly, p.19

81 Dictionary of New Zealand Biography Volume Two 1870-1900 Wellington: Bridget Williams Books & Department of Internal Affairs, 1993, pp.39-40; G.H. Scholefield (ed.) A Dictionary of New Zealand Biography Vol. 1 Wellington: Department of Internal Affairs, 1940, p.66

research of the ethnographers either subscribed to diffusionist theories of origin, or concentrated on recording accounts of warfare, battles, migrations and whakapapa rather than on other aspects of social organization. Ethnographical examinations of 'traditional' Māori society (usually drawn from the communities least affected by Pākehā contact and from the testimony of elderly Māori informants) were largely concerned with material culture and religious and ritual practices. Relatively little attention was paid to what might be called the political or legal ramifications of these practices.[82]

In their discussions of freshwater fisheries and fishing rights, most ethnographers did not use particularly consistent terminology to distinguish between 'ownership' or property rights, and 'usufructuary' or usage rights in fisheries. Best ascribed the ownership of lands and rivers to the tribes owning the adjoining banks, saying that at Rotorua "the surface thereof was divided into different areas belonging to different sections of the people."[83] On the other hand, when Beattie wrote of the Southland lamprey fishery, he did not say that the various hapū and families "owned" their fishing spots, but rather that they had "the right to fish there". Best also wrote of hapū, whānau and individuals having a right to fish, or "the right to fishing privileges", in certain waters, and said that this right was almost always based on the ownership of the banks of the waters.[84] The ethnographers were generally cautious about assigning 'ownership' of specific resource areas to small groups, while accepting that bodies of waters as a whole were subject to proprietary rights.

This is in general accord with ethnographical views of the derivation and exercise of land and resource rights. The ethnographers did not usually discuss the general sources of title, nor did they make the link between the nature of the title to land or waters and the nature of fishing rights. However, many gave specific examples of how particular rights were derived by a

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82 DNZB vol. 2, pp.39-40; Raymond Firth Primitive Economics of the New Zealand Maori London: George Routledge & Sons, 1929, p.xix; Raymond Firth Economics of the New Zealand Maori Wellington: Government Printer, 1959, pp.90-91; Claude Lévi-Strauss 'Social Structure' in A.L. Kroeber Anthropology Today: An Encyclopedic Inventory Chicago: University of Chicago Press, 1952, p.529; Sorrenson Maori Origins, pp.74-76

83 Elsdon Best The Maori Vol. II Wellington: Board of Maori Ethnological Research, 1924, p.401

84 Herries Beattie 'Nature-lore of the Southern Maori' TPNZI 52 (1920): 53-77, pp.53-54; Herries Beattie Our Southernmost Maoris Dunedin: Otago Daily Times, 1954, p.61; Elsdon Best The Maori as he was Wellington: Government Printer, 1974, p.96; Elsdon Best Fishing Methods and Devices of the Maori Wellington: Dominion Museum, 1929, p.82

group or individual. In most cases, these were maintained through inheritance from ancestors and long-term occupation.[85]

The hapū or tribe was held to have a right to larger resources, such as eel weirs. In his work on the Kāpiti Coast, the part-Māori local historian Wakahuia Carkeek listed numerous weirs owned by various 'tribes' or hapū. He also named three weirs as the former property of Muaupoko, the local iwi, which were later passed to the conquering Ngāti Toa. This implication that they originally belonged to all Muaupoko may mask forgotten hapū associations. When discussing the Whakapawaewae weir, Carkeek's source actually specified that the weir was the property of the whole Ngāti Turanga hapū.[86] Elsewhere in the Horowhenua, C.S. Curtis wrote of his experiences at the Hōkio Stream eel fishery in the 1960s. He was allowed to participate in this fishery because his wife belonged to Muaupoko, who "owned" the stream.[87]

In considering rights exercised by a smaller group, Best said that each "family" or whānau would have the right to use its own part of the tribal lands, including fishing areas. The "family" was the smallest unit to which he attributed "the right to fishing privileges" over certain defined areas. Best and other ethnographers and early anthropologists had a firm model of the classical whānau or extended family, consisting of three generations and in-married spouses, living together under the leadership of the senior male.[88] Some local historians also attributed rights in small fisheries to "families", although this word was sometimes also used by a number of early twentieth century writers to mean hapū. The types of property ascribed to family ownership include *pā tuna* (eel weirs) in the Horowhenua; and an eel weir near Waikanae described by Carkeek, where Eruini Te Marau and other members of his family (it is not clear whether his immediate family or his whānau) caught eels, rather than the use of the fishery being attributed to his hapū.[89]

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85 Beattie Our Southernmost Maoris, p.61; Beattie 'Nature-lore', p.53; W. Carkeek The Kapiti Coast Wellington: A.H. & A.W. Reed, 1966, p.112; C.S. Curtis 'Notes on Eel Weirs and Maori Fishing Methods' JPS 73 (1964): 167-170, p.169; W.J. Phillipps The Fishes of New Zealand Vol. I New Plymouth: Thomas Avery & Sons, 1940, p.37. Even Elsdon Best, doyen of the ethnographers, never came close to a codification of Māori tenure, and usually attempted to fit it to European rules of tenure (Customary Māori Land and Sea Tenure, p.13).

86 Carkeek, pp.136,139,145-148,155-156

87 Curtis, p.169

88 Best Fishing Methods, p.82; Best The Maori as he was, p.96; Metge New Growth from Old, p.35

89 G. Leslie Adkin Horowhenua Wellington: Department of Internal Affairs, 1948, pp.19-20; Carkeek, p.139

While Best rejected the idea, some historians wrote of some types of property belonging to individuals. Horowhenua amateur historian and archaeologist Leslie Adkin said *pā tuna* in Horowhenua were "family or individual property", and Carkeek listed a number of eel weirs belonging to named individuals alongside the hapū-owned eel weirs he also described. One of these, Harakeke, was said to belong to Wī Parata (an influential Ngāti Toa and Te Āti Awa chief, with considerable land interests around Waikanae), whose mother Metapere had owned it before him. Wī Parata also owned other weirs elsewhere, although others fished at some of these. The amateur scholar Rod McDonald described these individual rights as "occupation rights", acquired through long usage or other reason. The right to fish in a particular place was among the types of rights which could be exercised in this way.[90] However, much of the evidence used to adduce the existence of strictly individual rights is drawn from relatively late periods, when many whānau may have dwindled to a mere handful. The ascription of a right to an individual may also hide the fact that he or she held this right on behalf of the family, as the senior family member. This sort of right is therefore better described as a personal right.

Most writers recognized the existence of specific boundaries between the interests of different groups, especially in relation to resources. Beattie wrote of boundaries between hapū being recognized both in forests (birding areas) and rivers (eel fisheries). Particular fisheries could also be subdivided more closely, such as the apportionment of the famous lamprey fishery at Mataura among particular families or hapū of Kāi Tahu. Best wrote about divisions applying to communities as well as kinship groups, with fishing areas often being delineated by lines of stakes.[91]

Best in particular was interested in the spiritual aspects of control over resources. The most important of these as they affected fisheries was probably the custom of *rāhui,* or the imposition of a closed season over resources to prevent over-fishing, or spiritual pollution following a drowning. Best said that the waters were placed under tapu so that no fish could be taken from them, and that, "The person who instituted a *rahui* over a stream or lake could do so only over such portions thereof as were under his control, and the matter would be discussed and

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[90] Adkin, pp.19-20; Carkeek, pp.112,145-146; Rod McDonald Early Days in Horowhenua Palmerston North: G.H. Bennett, [1929], p.170

[91] Beattie Our Southernmost Maoris, p.61; Beattie Traditional Lifeways, p.345; Best Fishing Methods, pp.4,82; Best The Maori Vol. II, p.401

agreed to by all owners of such lands or waters."[92] Only a chief or a tohunga would have the authority to set up the marker which was usually put up to indicate the tapu state of the fishery, or to lift the tapu in the case of accidental death. The punishment for the infringement of a *rāhui* could be death, by either physical violence or *mākutu* (the use of spiritual power to harm others), especially if the breach had been deliberate.

The place of force in the Māori land tenure system, and as a control mechanism over fisheries, did not occupy the early twentieth century ethnologists in the way it had occupied nineteenth century observers. Conquests were little-discussed except by the historians of those areas affected. According to Carkeek, while the invaders might assume the land and resources of a conquered area for themselves, the defeated party might also carry on working the area as "captives" or "slaves".[93] Beattie mentioned the custom of *taunaha* or *tapatapa*, by which conquering chiefs bespoke certain parts of the conquered territory for the use of themselves and their descendants. This practice of naming areas after oneself or an ancestor, or more often after a body part or an action, extended the personal tapu of that person to the place. Explorers and migrants routinely named places in this way, thereby claiming these places for themselves and their descendants.[94]

D.M. Stafford, who wrote a tribal history of Te Arawa in the 1960s, cited an example of deliberate provocation used as a way of bringing a dispute over fishing rights in part of Lake Tarawera to a head. There had been a rift within Tuhourangi, and the offshoot group Ngāti Rangitihi began fishing in a part of the lake where the fishing rights were claimed by Tuhourangi. Tuhourangi sent a party to attack the fishermen but suffered heavier losses themselves when Ngāti Rangitihi retaliated. The battles continued but Ngāti Rangitihi also continued fishing at the disputed spot.[95] Others wrote about the acquisition of a fishery by other means, such as simply taking over a site abandoned by others. Carkeek gave the example of a weir near Ōtaki called Te Piri which was taken over by Ngāti Kauwhata after its previous owners Ngāti Tama had

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92 Elsdon Best Maori Religion and Mythology Part II Wellington: Government Printer, 1924, p.189

93 Carkeek, pp.139,145-146,155-156

94 Beattie Traditional Lifeways, pp.96,279; F. Allan and Louise Hanson Counterpoint in Maori culture London: Routledge and Kegan Paul, 1983, pp.52-53; Teone Taare Tikao, told to Herries Beattie Tikao Talks — Ka Taoka o te Ao Kohatu Auckland: Penguin Books, 1990, p.129

95 Stafford Te Arawa, pp.164-165

doned it.[96] Much of the ethnographical discussion of fishing rights takes this form — the history of tribal battles, migrations, and intermarriages is illuminated with details which also give an idea of the workings of the less tangible aspects of customary society and social organization, such as fishing rights.

The anthropologists paid more attention to questions of social organization and property rights, including fishing rights, but many then interpreted their findings within rigidly organized models of what had been a fluid and adaptable social structure, ignoring variations over space and time. Many young Māori well-educated in both the Pākehā and Māori spheres began to produce anthropological research from the 1920s onwards. They were able to interpret their traditional Māori knowledge for a wider Pākehā audience in the vocabulary of their respective fields, but often adherence to the accepted forms of academia limited their ability to express many of the uniquely Māori aspects of their topics.[97] Nevertheless, the prominence of Māori scholars such as Te Rangi Hiroa (Sir Peter Buck), who became Professor of Anthropology at Yale, and former Rotorua tourist guide Makereti Papakura, who studied anthropology at Oxford, gave Māori interpretations of their own history and society equal credence with those of Pākehā experts.

However, Pākehā academics still dominated the field. H.D. Skinner (the first professional academic anthropologist in New Zealand) and Raymond Firth brought the theories of Western anthropological studies to bear on the way they looked at Māori society. Firth's work on economic organization is an extremely valuable landmark in the anthropology of the Māori, even if his interpretations of Māori adjustment to the Pākehā economy are sometimes now held to be idealized. Because of his interest in economics, Firth's work includes much material relevant to fishing rights, such as trade, family and community organization, and communal labour. Fishing rights were almost always contemplated only where they were relevant to other topics under consideration.[98]

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[96] Carkeek, p.136

[97] John S. Allen 'Te Rangi Hiroa's Physical Anthropology' JPS 103 (1994): 11-27, pp.11,14

[98] His Ph.D. thesis was published in 1929 as Primitive Economics of the New Zealand Maori, and revised slightly for reissue in 1959 as Economics of the New Zealand Maori, the change in title reflecting changes in anthropological methodology in the intervening years.

Trends in social anthropology saw the theories of social structure introduced into the study of traditional Māori society, especially from the late 1940s onwards. 'Social structure' is a conceptual tool based on sociological constructs, which seeks to provide a systematic arrangement of the major patterns of social relationships which regulate actions. It produced largely static models, not taking into account time factors or social change; and it was most often applied to the study of kinship groups within uncomplicated or 'primitive' societies. In many ways the work of the social anthropologists of the Māori formed a continuum with that of the ethnographers, in that both saw customary Māori society and rights as largely unchanging. The social anthropologists and ethnographers did however apply completely different methodologies, as ethnographers took an historical approach in relying on the collation of data, whilst the social anthropologists constructed these data into models.[99]

The application of these trends in social anthropology to New Zealand anthropology is apparent, especially in the work of the 1960s. The application of kinship models had significant implications for the ways in which fishing rights and economic organization in general were considered. They did not allow for regional or temporal variation, or explanation of how fishing rights applied in particular rather than archetypal situations. The simplified approach of the kinship model also lent itself to the writing of general works on Māori society based on this theory. Much anthropological work of this period was also concerned with contemporary Māori society, and included historical material or descriptions of traditional society as a contextual background to these studies.

As much early anthropological work was concerned with economic organization, it looked at fishing rights in terms of the control of the means of production, and the relationships between social groupings and resource exploitation. According to Firth, while there was not a great range of wealth in traditional Māori society, chiefs were wealthier than most because of their "immediate control of sources of supply", and because a chief's large household could produce more food. He also said that the social status of a chief gave him authority over the handling of tribal land, and a "socio-political" interest in it, which did not extend to personal benefit.[100] One tool for the control of food sources was the *rāhui*. Firth said the power to impose

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[99] Raymond Firth 'Social Organization and Social Change' Journal of the Royal Anthropological Institute of Great Britain and Ireland 84 (1954): 1-20, pp.4-5,8; Lévi-Strauss, pp.525,529-530,539

[100] Firth Economics, pp.294,375-377

and lift *rāhui* lay with the head of a hapū, whose mana would be enhanced by such action; and that the deliberate infringement of a *rāhui* was a way of asserting a rival claim to a disputed resource, an action often followed by war.[101]

The anthropologists were particularly interested in the mechanics of distribution of communal goods. Firth said that chiefs or other persons of authority exercised control by dividing up catches of fish taken by communal effort, such as those taken at a large eel weir built by the larger community rather than a single family. Central to this process was the distributor, who would usually be the "headman" of the village or the kin group, by necessity "an upright person who would not favour his own relatives and provide them with an unduly large share", and who would be checked in any case by public opinion.[102] Te Rangi Hiroa wrote of the traditional inanga fishery at Rotorua, where large catches taken by communal effort in canoes were distributed among the people, with larger shares of the fish going to those with "wet skins" (*i.e.* the workers).[103]

These examples refer to chiefs and heads of whānau or "headmen", who were seen to be exercising control on behalf of the community. Firth believed that the community derived its general rights primarily from ancestry, although occupation was necessary to ratify any sort of claim to rights. The hapū was seen to derive its rights to land under a vague iwi overright, while individuals and families then inherited occupation or use rights within those hapū areas. Unlike many earlier writers, he wrote about the conversion of title through conquest to an ancestral title as the conquerors continued to occupy and develop links with the land. Firth said that people were able to claim rights by descent from any ancestral line, so long as they qualified their rights by residence or occupation.[104]

A number of anthropologists recognized the existence of clearly defined resource areas, which were sometimes physically marked. They tended to ascribe the rights in these divisions to various kin groups, either hapū or whānau. The fishing areas attributed to a hapū included

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[101] ibid. pp.259,375-377

[102] ibid. pp.287-290. There is a photograph of the apportionment process in Best Fishing Methods, p.185

[103] Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua' TPNZI 53 (1921): 433-451, pp.441-442

[104] Firth Economics, pp.112-113,139,374-375,378-379,387; Te Rangi Hiroa The Coming of the Maori Wellington: Maori Purposes Fund Board, 1949, pp.380-381; Eric Schwimmer The World of the Maori Wellington: A.H. & A.W. Reed, 1966, pp.80-81

fishing stands, marked areas of lake, large eel weirs, and other large fisheries. They also stated that there was a common right vested in the tribal members over the unappropriated parts of the tribal estate, and that the waters in general belonged to the tribe or hapū.[105]

Firth also wrote about fishing rights exercised by whānau or individuals. He attributed food production activities such as fishing from canoes or building small eel weirs on branch streams to "whānau" or "family" groups, especially the males. Such weirs would thenceforth be the property of that whānau. He characterized whānau rights as being over resources such as fishing stands, eel weir sites and shellfish beds; while individuals might have rights over fishing stands or rocks, held against other family members if necessary.[106] He also wrote that individuals often inherited fishing rights from their parents:

> In general, property as well as rank descended in the true family line, and could be inherited through either parent. Goods, fishing rights, etc., were apportioned at death amongst all the children, whether of a polygynous marriage or not, the eldest son as a rule obtaining the largest share.[107]

Many anthropologists were also interested in drawing distinctions between ownership of land and resources, and the lesser rights of usufruct. They generally regarded most resources as subject to usage rights rather than outright ownership. Firth took the example of the Southland lamprey fishery, and the divisions seen in the Bay of Islands by John Nicholas in the early nineteenth century,[108] as evidence of exclusive fishing rights, but he falls short of describing them as property. Likewise, the fisheries used by families or individuals within the lands "held ... in exclusive possession" by the hapū were described as "private rights", not properties.[109] However, Firth also wrote that both large and small eel weirs were the property of the group that built them,[110] but it is likely that this refers to the actual fabric of the weir rather than to the underlying

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[105] Firth Economics, pp.350,378-382,390; Makereti [Papakura] The Old-Time Maori Auckland: New Women's Press, 1986, pp.220-221,239,244; Joan Metge The Maoris of New Zealand: Rautahi London: Routledge & Kegan Paul, 1967, pp.12-14; Te Rangi Hiroa The Coming of the Maori, p.381; Te Rangi Hiroa 'Maori Food-supplies', pp.436-438; Schwimmer, pp.31,36,40,82

[106] Firth Economics, pp.111,128,224,350,378-382

[107] ibid. p.128

[108] See page 53 *infra*.

[109] Firth Economics, pp.378-382

[110] ibid. p.350

fishery. Te Rangi Hiroa agreed that an individual might have the use of parts of the tribal estate, but "he could not be said to own any particular portion in perpetuity."[111]

Firth detailed circumstances under which clear distinctions were drawn between the "ownership" and the "usufruct" of a particular resource. One of these was the "tribute" arrangement by which the beneficiaries of the usufruct in a fishery would gift back part of the resource to the absentee owners, in deference to their underlying title. He added that:

> ... the tribute must be offered annually as acknowledgment of ownership of the land, but should it once be accepted, then it confirms the right of usufruct, a right which otherwise remains at the goodwill of the owners from year to year.[112]

If the owners wished to limit the right of the 'tenants' to continue exercising the usufruct, they would refuse the 'tribute'.

According to Firth, families or villages might also have the "usufruct" of an area for just one season, in which case they would give part of the produce to the owners in recognition of their ownership, not as 'rent'. He also distinguished between "grants of usufruct" and "outright cession" of land; and between usufructuary rights over fisheries and ownership rights over the adjoining land. For example, he wrote of "fishing privileges" in part of the Tauranga River which were exercised by the Ngāi Turanga hapū, even though it did not have any "riparian" rights.[113]

This last example indicates a new concern of scholars in the early twentieth century, that of the ownership of waters and the severability of this from the ownership of the land. This was also a new concern in the legal system, as Māori sought to have ownership of lakes and rivers investigated.[114] Pākehā legal forms required that the title to the bed of the lake or river be investigated, rather than the waters as such, but the Native Land Court did not look specifically into the ownership of river beds as well as river banks when investigating title. Some anthropologists and ethnologists made passing references indicating that waters might be capable of ownership in their own right under customary Māori tenure. Te Rangi Hiroa wrote that defined

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[111] Te Rangi Hiroa The Coming of the Maori, p.382

[112] Firth Economics, pp.295-296; Firth Primitive Economics, p.31

[113] Firth Economics, pp.295-296,378; Firth Primitive Economics, p.31

[114] See page 87 *infra*.

parts of Rotorua "belonged to" different families and sub-tribes; Curtis said he was able to assist with eel fishing in the Horowhenua because his wife's people Muaupoko "own the Hokio stream and the Horowhenua lake"; and Best said that lakes and rivers were "property", in the ownership of the owners of the adjoining lands.[115]

The development of social anthropology in New Zealand, especially in the 1960s, had little direct implication for the perception of fishing rights, although the work of the social anthropologists had implications for the wider framework within which fishing rights were considered. In particular, the concentration on a rigidly pyramidical kinship structure[116] tended to emphasize and crystallize the often artificial divisions of fishing rights into iwi, hapū, whānau and individual rights. The emphasis on a modelled structure allowed little space for the discussion of the fluidity of traditional Māori society, kinship affiliations and obligations, and resource use. It also tended to mask the more informal and personal factors which influenced the exercise of fishing rights in any given area and at any given time.

Social anthropologist Joan Metge and her contemporary Eric Schwimmer, writing in the 1960s, sought to explain how ancestral rights were maintained or allowed to lapse by individuals. They said any claim to hapū membership had to be validated by participation in group activities, and residence was required to reap full benefits. Thus most people would have full or primary allegiance with one group while keeping up lesser or secondary rights with a few others, and they could change their primary group by going to live with another. Rights that were allowed to lapse would be extinguished after an absence of three or four generations, although later descendants could establish their kinship and be received hospitably as guests and kin.[117]

In her 1960s work, Metge described the "whānau or household" as the most usual unit of day-to-day economic activity, having rights of occupation and use over specific resources such

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[115] Curtis, p.169; Best The Maori Vol. II, p.401; Te Rangi Hiroa 'Maori Food-supplies', p.436

[116] Under the model of Māori society supported by many anthropologists of the mid-twentieth century, iwi or tribes divided into a number of hapū or sub-tribes, and these into whānau or extended families. Iwi might also divide into a number of powerful major hapū which divided further into minor hapū. Firth Economics, pp.110-116,378-382; Makereti, pp.34,38; Metge The Maoris of New Zealand, pp.6,12-13,21 (*cf.* Metge New Growth from Old, pp.45-46); Schwimmer, pp.31-37

[117] Metge The Maoris of New Zealand, p.7; Schwimmer, pp.34-35,81; see also Crocombe 'An Approach to the Analysis of Land Tenure Systems', pp.12-15; J. Prytz Johansen The Maori and his Religion in its Non-ritualistic Aspects Copenhagen: I Kommission Hos Ejnar Munksgaard, 1954, pp.16-18

as garden plots and fishing areas, but she also described rights to some particular properties as vesting in a "nuclear family" or in individuals.[118] She did not explain why some rights might be exercised by a nuclear family and others by only one individual within that family, but added that those pursuits which required a larger workforce than the whānau could provide were undertaken by an *ohu* or group of villagers under the leadership of a tohunga.[119] This mention of a group of "villagers" rather than kinfolk indicates another area of concern for anthropologists, that of the links between residence and kinship. They found that the most important residential arrangement was the village or *kāinga*, which was occupied largely by a hapū and associates, with each whānau having their own area.[120]

The social anthropologists were wary of equating resource rights with ownership rights, especially at the lower levels of exploitation. Schwimmer used the term "usehold" to describe the rights which whānau had over the garden plots, fishing stands and small eel weirs allotted to them, while hapū had "the right to occupy a certain portion of the tribal [iwi] land." He added that there were some individual rights (which he did not describe) that were "clearly defined and jealously guarded."[121] Metge also used the language of usage rights, saying that individuals and "sub-groups" were limited to "rights of occupation and use" over some fisheries and other resource areas, while the hapū had in addition an overright, or control and rights of alienation. She equated "individual ownership" with "rights of use" in particular areas.[122]

The model of Māori society produced by the ethnologists and anthropologists has been substantially revised in many respects in the process of the contemporary debate, especially the rigidly defined kinship model constructed by the social anthropologists. More recent commentators, including anthropologists, have adopted a much less structured pattern of kinship relationships, which incorporates the fluidity of traditional kin structures and recognizes the implications for patterns of resource use. One aspect of the interpretation of Māori rights which has been

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[118] Metge The Maoris of New Zealand, pp.12-14,21. See also Johansen, pp.14-15.

[119] Metge The Maoris of New Zealand, p.12

[120] Many anthropologists made rigid connections between the hapū and the *kāinga*, although it was also said that a large hapū might sometimes stretch across more than one *kāinga*, or a large *kāinga* contain more than one hapū. Firth Economics, pp.91,110-113; Makereti, p.38; Schwimmer, pp.32-36

[121] Schwimmer, pp.32-33,78,82

[122] Metge The Maoris of New Zealand, pp.12-14

carried over is the discussion of the nature of property rights in fisheries, most particularly ownership rights and usage rights on a variety of levels. In other areas there has been a development of ideas raised by earlier commentators. An example is the holistic approach of most modern writers. While early anthropologists like Firth dealt with issues such as chieftainship largely as issues of economic control, in recent times the emphasis has been on the management of resources for both the spiritual and physical benefit of the people. In this respect there has been a great shift in perceptions of fishing rights in the course of the twentieth century. For the first three-quarters of that century public perceptions of Māori fishing rights were dominated by the systematized interpretations of mostly Pākehā academic observers, but in the last decade or two Māori voices have been heard much more strongly, and traditional Māori interpretations have been incorporated in the new model.

CHAPTER TWO

Understanding the Context: The Evolution of Nineteenth Century Pākehā Interpretations of Fishing Rights

This right of fishing is often a source of quarrel, even among families of the same tribe, and has given rise to many bloody encounters, and it makes them set a value on land, which to all appearance is useless.[1]

Just as contemporary interpretations of customary Māori freshwater fishing rights have influenced and been influenced by parallel developments in political and legal thought, the political and legal environment of nineteenth century New Zealand affected the ways in which fishing rights were construed, especially by Pākehā. As the case studies in the latter part of this thesis draw heavily upon nineteenth century sources, most especially on the minutes of the Native Land Court, the views of nineteenth century observers on various aspects of Māori society and tenure are important if the evidence given to the Land Court is to be put in its proper context. The Court did not operate in a vacuum, and many of its judges had previously been active in political, judicial and military life. They brought with them to the Court the views developed in their dealings with Māori in their previous posts as military officers, resident magistrates, native lands commissioners, and other sorts of civil servants, and therefore different judges took different approaches within the overall restrictions of the governing legislation.

The surviving evidence of nineteenth century views of fishing rights, from both Māori and Pākehā, was not generated in a spirit of disinterested enquiry but in response to matters of great public interest and importance. It is because of this complex process of debate and cross-pollination of thought between missionaries, settlers, politicians, soldiers, and judges that this chapter concentrates on published sources, such as books and official documents, which both fed off and made a contribution to the wider debate. Out of this debate was constructed a Pākehā model of Māori tenure which was largely complete by the end of the nineteenth century, and which survived until near the end of the twentieth century.

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1 John Johnson 'Notes from a Journal' in Nancy M. Taylor Early Travellers in New Zealand London: Oxford University Press, 1959, p.141

Perhaps the main point of contact between Māori and Pākehā in the mid and late nineteenth century was on the fringes of Pākehā settlement, which meant that Pākehā perceptions of Māori were strongly coloured by the circumstances of land purchase, and in the 1860s and early 1870s, war. As a result, the issues which dominated Pākehā discussion of traditional Māori land tenure were those which impinged directly on this process of settlement. Beyond the initial sketchy impressions of the earliest commentators, the issues which dominated public discussion of Māori tenure were the relative rights of the tribe and individuals over land, the role of chiefs and individuals in the management and alienation of land, and the place of conquest in customary tenure. Another widely-discussed issue, which had more relevance for the consideration of freshwater fishing rights, was 'acts of ownership' or the range of activities which might indicate ownership of land. Thus, to separate the discussion of fishing rights from the concurrent debate over Māori tenure in general, with all the wider implications of that debate for the place of Māori in colonial New Zealand, would be to risk misinterpretation.

The first outsiders to consider Māori land and resource rights were the earliest European visitors to this country, by their nature curious and inquisitive people. They were followed by those who wished to have a more permanent effect on the country, the missionaries and other early settlers. Many of these people recorded their observations in print for a curious lay audience back in Europe, and later for a growing New Zealand readership, but they brought with them cultural baggage and preconceptions shaped by their personal convictions concerning the nature of non-European peoples and the relative position of Māori and Pākehā in the racial hierarchy. The degree to which these preconceptions were challenged or confirmed depended upon the personal experiences of each individual in the new country. These earliest observers had a number of areas of interest. The first travellers showed an interest in aspects of Māori society such as social organization, religion, and material culture; the missionaries had an interest too in the social structure and power of chiefs, which they had to work with themselves to win followers.

More and more settlers arrived seeking land in the late 1840s and 1850s, and the large initial 'purchases' of the New Zealand Company and the government began to fill up. Māori came under pressure to alienate more land, and the government was expected to facilitate purchases. This prompted a corresponding shift in perceptions of resource rights. Many Pākehā observers, particularly those holding official positions, sought through their expositions of the

traditional state of Māori tenure to justify the government's aggressive and aggrandizing behaviour, epitomized at Waitara. A disputed land purchase led to the outbreak of war there between Māori and imperial troops in 1860, after the British fired on the pā of the Taranaki chief Wīremu Kīngi, who had vetoed the sale by Te Teira of his personal interest in tribal lands.[2]

A minority of Pākehā observers produced arguments which rejected these justifications and rebutted the government's position on land sales. Both interpretations revolved around the question of alienation rights, in light of the conflict at Waitara, but the concept of alienating land in return for money was solely a response to Pākehā demands for land and cannot be said to be a part of customary Māori land tenure. In customary practice, complete alienation had been a very rare occurrence, and the alienation right was not central to land tenure; whereas the idea of land as a freely-transferable individual asset was deeply rooted in English culture. Most of the debate was conducted with as much reference to English tenure as to Māori custom, with many observers discussing Māori customary tenure in the language of feudalism and common law.[3] The concentration of both sides of the argument on alienation rights and associated issues, such as the relative rights of chiefs and ordinary tribal members when it came to land management (with all the feudal connotations raised by that issue), dominated discussion of Māori resource rights in the late 1850s and 1860s, when opinions on Māori tenure began to be codified.[4]

The process of alienation was accelerated and completed through the agency of the Native Land Court, established in 1865 to determine the ownership of lands remaining in Māori hands and to extinguish "proprietary customs" or customary title over those lands, by granting Crown-derived titles to the owners as individuals rather than to the tribe or hapū. This was a policy designed to facilitate the alienation of Māori land and to unburden the government, which had been embarrassed by the conflict that had arisen when land of disputed ownership had been

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2 'Wiremu Kingi Te Rangitake' The People of Many Peaks: The Maori Biographies from The Dictionary of New Zealand Biography, Volume 1, 1769-1869 Wellington: Bridget Williams Books & Department of Internal Affairs, 1991, pp.261-266; James Belich The New Zealand Wars and the Victorian Interpretation of Racial Conflict Auckland: Penguin Books, 1988, pp.79-82; Alan Ward A Show of Justice: Racial 'amalgamation' in nineteenth century New Zealand Auckland: Auckland University Press, 1974, pp.114-115. See also page 96 *infra*.

3 See Alan Macfarlane The Origins of English Individualism: The Family, Property and Social Transition Oxford: Basil Blackwell, 1978, pp.80-131, on land as a commodity in mediæval and early modern England.

4 See in particular 'Report of a Board Appointed by His Excellency the Governor to enquire into and report upon the State of Native Affairs' 1856 House of Representatives; 'Extracts from Opinions of Various Authorities:- Native Tenure' AJHR 1861 E-1 Appendix A

offered for sale. The policy also eroded the power of Māori communities to retain control over tribal lands.[5]

The adoption of formal, legal proceedings as a basis for the investigation of land ownership furthered the process of formalization and codification of land rights, as a body of case law was developed and judges crystallized their own experiences of Māori tenure into rules which they applied in their courts. This process was more or less complete by the end of the nineteenth century, but the rules and principles established by the Native Land Court continued to be adopted wholesale by other branches of the judiciary for another century. Cases involving Māori fishing rights also appeared before the general courts when there was a conflict with Pākehā or Pākehā laws, and the findings of these courts had implications for the ways in which surviving customary rights were perceived.

The ongoing discussion also highlights the difficulties that almost all nineteenth century commentators had in explaining Māori concepts of tenure and rights in the language of English tenure, feudalism, and common law. This was especially apparent in discussions concerning fisheries, where English concepts were largely unchanged since Saxon and Norman times, and particularly unsuitable for describing Māori concepts. English common law treats fisheries very differently from Māori custom, and takes a contrasting view of different types of water — open seas, tidal zones, lakes, and rivers are all treated in a diverse manner. It also regards many fisheries as subject to public rights of access, whereas all Māori fisheries were 'owned' by some group. English law regarded open sea fisheries as public and open to all, due to the inability of the state to regulate such resources until relatively recent times. In common law, there could be no private right to tidal fisheries (or later, navigable tidal fisheries) except where there had been a grant made prior to Magna Carta in 1215, which caused confusion amongst colonial lawyers confronted with obviously private tidal fishing rights among indigenous peoples.

Freshwater fisheries were subject to a more complex range of real property interests, held under feudal forms of title. Fishing grounds usually belonged to the owners of the adjoining banks, who also had rights of access. Freshwater fishing rights could however be severed from their surroundings and sold or leased to another person, with conditions attached to the grant. Different aspects of a single fishery, such as the right to fish at particular seasons or use specific

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[5] The effects of the Court process on Māori will be investigated more fully in Chapter Three.

types of fishing equipment, could be granted, sold or leased to different people. In mediæval times fishing rights could also be rented from the Crown or feudal landlord. There were also some common-property freshwater fisheries, established by custom or grant, and used by a defined community under conditions similar to common lands. These common fisheries were subject to enclosures and purchases, and almost all common fishing rights were extinguished in the eighteenth century. The conversion of common fishing rights to private sport-fishing rights and harsh penalties for poaching were unpopular with many sectors of the community, and in many British colonies there was strong social pressure for open-access fisheries.[6] These concepts were the foundation for those British observers who wrote about Māori fishing rights in the nineteenth century.

First contact and early settlement — pre-War Pākehā views of Māori rights

The earliest visitors to New Zealand, and then the missionaries and the first post-annexation settlers, came to New Zealand bearing with them the racial attitudes of their period, and views on the contact between Europeans and indigenous peoples. Captain Cook, the first European to get the opportunity to make peaceful observations, paid great attention to Māori cannibalism and warfare, but at the same time emphasized the civilized nature of the Māori as evidenced by their hospitality towards himself and crew.[7] The early travellers were followed by sealers and whalers, who have left little record of their views of Māori.

The first systematic settlers in New Zealand were the missionaries, who had very different motives in coming to New Zealand. By the early 1800s there was a climate of humanitarianism amongst the educated public of Britain, who believed that 'primitive' peoples were in

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6 S.V. Ciriacy-Wantrup and Richard C. Bishop ' "Common Property" as a Concept in Natural Resources Policy' Natural Resources Journal 15 (1975): 713-727, p.721; Bonnie J. McCay 'The Culture of the Commoners: Historical Observations on Old and New World Fisheries' in Bonnie J. McCay and James M. Acheson (eds) The Question of the Commons: the culture and ecology of communal resources Tuscon: University of Arizona Press, 1987, pp.198-202; New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi Wellington: Law Commission, 1989, pp.13-15,68-79,137-141; Anthony D. Scott 'Conceptual Origins of Rights Based Fishing' in Philip A. Neher, Ragnar Arnason and Nina Mollett (eds) Rights Based Fishing Dordrecht: Kluwer Academic Publishers, 1989, pp.11-20

7 Ngahuia Te Awekotuku He Tikanga Whakaaro: Research Ethics in the Maori Community Wellington: Manatū Māori, 1991, p.10; Belich The New Zealand Wars, p.327; M.P.K. Sorrenson Maori Origins and Migrations: The genesis of some Pakeha myths and legends Auckland: Auckland University Press, 1979, pp.59-62

need of 'improvement'. Evangelical fervour was an important aspect of humanitarianism, and the missionaries sought to give the Māori the benefits of Western civilization, especially Christianity, while protecting them from the less savoury aspects of Western culture. The tenets of humanitarianism held wide sway until the late 1830s, and were held by many of the early colonial officials as well as the missionaries. These principles underpinned the apparently generous provisions of the Treaty of Waitangi, and continued to influence policy until the transition from Crown colony government to full responsible government in 1856.[8]

Many of the early observers left clear indications of their racial views in their writings. The Māori seem to have been better regarded than most of the other indigenous peoples encountered by the British, presumably because of their relatively sophisticated social organization and apparent class system, with which the British were able to identify. Many missionaries believed the Māori to be one of the lost tribes of Israel, albeit in a degenerate (but not irredeemable) state.[9] In the early days at least, it was usual for influential figures to treat Māori with tolerance or respect rather than contempt. Outside the new townships, settlers integrated into Māori communities on largely Māori terms, and the pressure for alienation of Māori land was not yet heavy. For those who had less inclination to treat Māori well, their skills as warriors promoted caution, as demonstrated in conflicts at Wairau, the Hutt Valley and the Bay of Islands in the mid-1840s.[10]

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[8] Belich The New Zealand Wars, pp.310,327-329; Christine Bolt Victorian Attitudes to Race London: Routledge & Kegan Paul, 1971, p.185; Ronald Hyam Britain's Imperial Century, 1815-1914: A Study of Empire and Expansion (2nd ed.) Lanham, Maryland: Barnes & Noble, 1993, pp.74-76,83-84,90-92; John Miller Early Victorian New Zealand: A study of racial tension and social attitudes 1839-1852 London: Oxford University Press, 1958, pp.vii,11; Claudia Orange The Treaty of Waitangi Wellington: Allen & Unwin, 1987, pp.25-26,30-32,99; Robin Winks 'A System of Commands: The Infrastructure of Race Contact' in Gordon Martel (ed.) Studies in British Imperial History London: Macmillan, 1986, p.21. A settler assembly was first established under the Constitution Act, 1852, and met from 1854, passing laws on internal affairs; official control of 'native policy' and Māori land purchases remained with the Governor until transferred to the New Zealand Assembly by the Colonial Office in 1862. Settlers had been keen to influence Māori policy but were unwilling to take full responsibility and pay the full costs, especially the cost of keeping an army in the field. See Raewyn Dalziel 'The Politics of Settlement' in Geoffrey W. Rice (ed.) The Oxford History of New Zealand Second Edition Auckland: Oxford University Press, 1992, pp.92-94,101-102; Ann Parsonson 'The Challenge to Mana Māori' in ibid. p.173; B.J. Dalton War and Politics in New Zealand 1855-1870 Sydney: Sydney University Press, 1967, pp.151-159,171-175.

[9] Belich The New Zealand Wars, pp.324-328; John Carne Bidwill Rambles in New Zealand London: W.S. Orr & J. Fitze, 1841, p.39; T. Lindsay Buick Old Marlborough Palmerston North: Hart & Keeling, 1900, p.135; Sorrenson Maori Origins, pp.14-17,25,68-72; Winks, pp.21-22; William Yate An Account of New Zealand and of The Church Missionary Society's Mission in the Northern Island London: Seeley and Burnside, 1835, p.105

[10] Alexander Bathgate Colonial Experiences; or Sketches of People and Places in the Province of Otago, New Zealand Glasgow: James Maclehose, 1874, p.254; Belich The New Zealand Wars, pp.302,304-305,310; Miller, pp.75,77,103

Given the issues of colonization and settlement, many observers of Māori society in pre-war New Zealand were interested in the structural workings of the tribes. They considered the questions of political and legal authority, especially the role of the chiefs. With the arrival of increasing numbers of settlers from 1840 onwards, matters of land ownership and alienation rights also became of prime importance. Fishing rights tended to be considered as a part of the resource rights issue, although the general questions of authority and ownership also had implications for specific issues such as fishing rights.

Prior to the outbreak of war, discussions of political and legal authority revolved mostly around the rights of the chiefs and the effects of mana. The general consensus of the missionaries and early officials was that chiefly mana was an abstract notion which did not necessarily extend to firm authority over land, and chiefs could only express their opinion on land matters in their capacity as protector of the tribe. The degree to which their opinions would be acceded to by others in the community depended on the standing and authority of the particular chief.[11] This debate around chieftainship and mana was often firmly linked with land alienation, as can be seen from the comments of missionary James Hamlin, who had come to New Zealand in 1826:

> The term [mana] as applied to land is scarcely heard of in some districts.... In the Bay of Islands where land purchases were first made, the Native of every degree of rank sold his land without reference to any other authority.... And if there is such a thing as *mana o te whenua*, it is a certain invisible, indescribable something to which the Pakeha may attach a meaning wholly at variance with that which a Native may affix to it.[12]

In contrast, the idea of chiefs as powerful lords was particularly common amongst those strongly in favour of settlement. The youthful Edward Jerningham Wakefield, sent to Whanganui in the early 1840s to make land purchases for the New Zealand Company, wrote that in the "perfectly

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11 'Evidence Relative to the Origin of the Native Insurrection' AJHR 1860 E-4, pp.2-3; 'Further Papers Relative to the Native Insurrection — The Taranaki Question and "Seignorial Right" ' AJHR 1861 E-1, pp.8-9; 'Extracts from Opinions of Various Authorities', pp.8,11,14-15; George Clarke [Jnr] Notes on Early Life in New Zealand Hobart: J. Walch & Sons, 1903, p.46; Edward Shortland Maori Religion and Mythology London: Longman, Green, & Co., 1882, pp.89-91; Arthur S. Thomson The Story of New Zealand: Past and Present — Savage and Civilized London: John Murray, 1859, vol. I pp.95-96. While some of these books date from well after the 1850s, they were all written in a private capacity by men who had served as officials in New Zealand in the 1840s.

12 'Extracts from Opinions of Various Authorities', pp.6-7. Hamlin's comments are not dated and may date from around 1860. Nevertheless, they are representative of much pre-war thought on chieftainship.

wild tribes", chiefs had "absolute political authority", which was progressively weakened as the tribe was "civilized".[13]

As part of their interest in the extent of political authority, many commentators discussed the matter of boundaries between tribes. Most believed that the major boundaries between waka and iwi were largely established in the early days of Māori settlement as the various groups established themselves across the country, and that hapū boundaries were also established by custom and general acceptance of ancestral distributions. Whanganui missionary Richard Taylor wrote of a number of ways in which the more isolated boundaries were defined — by rat runs and hunting areas, by paths, and sometimes by landmark rocks and trees; and J.L. Nicholas, who visited New Zealand with Samuel Marsden in 1814, observed that in the Bay of Islands:

> ...the right of fishing in certain places is recognized among them, and the limits marked out by stakes driven into the water. We observed several rows of these stakes belonging to the different tribes, each having respectively their prescribed boundaries, beyond which they durst not venture to trespass...[14]

Others believed that this use of boundary markers to separate more minute divisions of resources was common, and that boundary disputes between friendly groups were often mediated.[15]

While most of these early observers accepted that Māori had some quasi-legal rules by which they operated, almost all rejected the idea that there could be said to be a single body of land law applicable to and binding on all the tribes of the country. John Savage, ship's surgeon on the whaler *Ferret* which visited in the Bay of Islands in 1805, believed that there were "wise and salutary laws" but that circumstances led to the prevalence of military discipline. The British Resident, James Busby, wrote of there being "no fixed rule" as to land; while Hamlin believed

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[13] Edward Jerningham Wakefield Adventure in New Zealand from 1839 to 1844 Christchurch: Whitcombe and Tombs, 1908, pp.356-357

[14] Richard Taylor Te Ika a Maui, or New Zealand and its Inhabitants London: Wertheim and Macintosh, 1855, pp.385-386; J.L. Nicholas Voyage to New Zealand Vol. 1 London: James Black and Son, 1817, p.235

[15] 'Extracts from Opinions of Various Authorities', p.4; William Colenso 'On the Maori Races of New Zealand' TPNZI 1 (1868): 339-424, p.362; Shortland Maori Religion, p.89; Edward Shortland The Southern Districts of New Zealand London: Longman, Brown, Green, & Longmans, 1851, p.96; Yate, p.103. See page 59 *infra*. William Colenso and Edward Shortland have retained a reputation as sensitive and knowledgeable authorities on Māori society until the present day; and even though some of their works were published during or after the wars their views represent the earlier scholarly and humanitarian approach to the study of Māori society. Atholl Anderson 'Towards an Explanation of Protohistoric Social Organisation and Settlement Patterns Amongst the Southern Ngai Tahu' NZJA 2 (1980): 3-23, p.10; Te Awekotuku, pp.10-11; The Dictionary of New Zealand Biography, Volume One, 1769-1869 Wellington: Allen and Unwin/Department of Internal Affairs, 1990, pp.87-89,394-397; Manatū Māori Customary Māori Land and Sea Tenure Wellington: Manatū Māori, 1991, p.13; Waitangi Tribunal Ngai Tahu Report 1991 (Wai 27) Wellington: Brooker and Friend, 1991, p.256

that there was no "general plan for their guidance in the management of their lands, or other affairs .... Each party or tribe seems to have been guided by existing circumstances in the management of their affairs."[16]

While denying the existence of firm rules, missionaries and other earlier visitors were in general agreement on the subject of the derivation of title to land, and the usual principles governing the transmission of land rights across the generations. The established version was that upon their arrival in New Zealand, the earliest Māori spread out in family groups which continued to segment and partition the land amongst themselves. Pākehā commentators agreed that the inheritance of uninterrupted title by descent from these earliest ancestors formed the most common and by far the strongest *take* or source of a right to land among Māori, and that this connection to the land through blood ties and tribal history made it important that ancestral land not be lost from the tribe. Thus there were restrictions applying to alienation of land outside the tribe, and the land rights of individuals who left or joined the tribe.[17]

These principles were also held to apply to the more personal associations with the land, such as the garden plots and small fishing sites used by individuals or small family groups. These were also passed down through a line of descent rather than reabsorbed into the tribal estate, unless there were no heirs to whom the right could pass. Edward Shortland, the widely-travelled Sub-protector of Aborigines, described a typical deathbed disposition of a father's lands, with the sons (and sometimes brothers and nephews) sharing out the lands amongst themselves according to their dominance. According to him, daughters only received lands if their father or brothers wished them to, lest they marry out of the tribe.[18] However, others averred that these personal rights to resources, and also rights within the larger tribal estate, could not be

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16 John Savage Some Account of New Zealand; particularly the Bay of Islands and surrounding country London: J. Murray & A. Constable, 1807, pp.29-30; 'Further Papers Relative to the Native Insurrection', p.6; 'Extracts from Opinions of Various Authorities', p.7. Busby's comments, like Hamlin's, were written around the time of the war, but he had been in New Zealand since 1833.

17 'Extracts from Opinions of Various Authorities', pp.4,8,11,13; A.D.W. Best The Journal of Ensign Best Wellington: Government Printer, 1966, p.348; Clarke, p.46; Colenso, p.362; Shortland Maori Religion, pp.90-93; Edward Shortland Traditions and Superstitions of the New Zealanders London: Longman, Brown, Green, Longmans & Roberts, 1856, p.307; Thomson, vol. I pp.96-97

18 'Extracts from Opinions of Various Authorities', pp.12,15; Shortland Maori Religion, pp.90-93; Shortland Traditions and Superstitions, pp.271-276,295-296; see also Colenso, p.363; 'Opinions of Various Authorities on Native Tenure' AJHR 1890 G-1, p.22. While not collated until 1890, many of the opinions in this last collection were drawn from the 1840s and 1850s.

claimed simply by proof of descent, especially if the claimant had not been born on the land. The right had to be kept up by occupation or acts of usage, otherwise the rights would revert to the tribal group or other members of the family.[19]

According to Bishop Selwyn, Shortland, and others, special conditions applied to the rights enjoyed by individuals who married outside their own immediate hapū or community group. Daughters (or, less commonly, sons) who left the community on marriage usually forfeited their right to inherit, which prevented outsiders getting a foothold on the land through their spouses without the agreement of the tribe. Where a woman did retain rights with her own people, either by being given land as a dowry or by returning at times to her home area to exercise her resource rights, these rights could only be inherited in turn by those of her blood descendants who actively maintained the relationship with their mother's family. Her rights reverted to her family if she died childless.[20] Shortland and the missionary printer William Colenso believed that a man had some rights over his wife's land, but only during her lifetime and while their children were too young to exercise their rights. His rights ended when the children assumed theirs.[21]

The consideration of the question of inheritance, as well as the prospect of land alienation, brought many to the discussion of the distinction between tribal or community rights and individual rights to lands and resources.[22] This is the area in which there was the most disagreement amongst Pākehā observers, perhaps due to the political nature of the question. There was an inevitable connection between individual versus tribal rights and alienation in a

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19 'Opinions of Various Authorities', p.22; Shortland Traditions and Superstitions, pp.274-275; Thomson, vol. I p.97

20 'Extracts from Opinions of Various Authorities', p.4; 'Opinions of Various Authorities', p.22; Shortland Maori Religion, p.93; Shortland Traditions and Superstitions, pp.271-276; Thomson, vol. I p.97. Richard Taylor's opinions conflicted with those of other observers of this period — "in this country the custom is quite the reverse to ours; the gentleman accompanies the bride to her home and becomes one of the tribe he has married into". He did not make it clear whether this applied only to chiefly marriages, or whether it was confined to the Whanganui area, which he was most familiar with. Journal of Richard Taylor, Alexander Turnbull Library qMS 1985-1990, vol. 5, 2/10/1848.

21 Colenso, p.362; Shortland Southern Districts, p.97. See page 53 note 15 *supra*.

22 While nineteenth and early twentieth century writers almost always referred to 'individual' rights when contrasting them with 'tribal' or 'communal' rights, the term is somewhat deceptive. When referring to natural resources, a more accurate term might be 'personal rights', which reflects that others in the household, especially dependents, would also share in any resource attributed to an individual.

period of British settlement and land acquisition, and this was the issue that brought Māori-Pākehā conflict to a head at Waitara. Most commentators also struggled to reconcile Māori and Western concepts of ownership and usage.

There was little dissension, especially in missionary circles, from the idea that a tribal title lay at the heart of Māori land tenure and tribal unity and security, and that any individual title did not convey with it a right to act contrary to the interests of the greater tribal group. Particularly, it did not give the holders of individual rights the right to alienate their interest from under the feet of the other members of the tribe without the consent of the wider group, all of whose interests would be affected by such a move. They believed the tribal hold over the land and resources was particularly strong over ancestral lands, as compared with conquered or gifted areas. This view was maintained by senior ecclesiastical figures such as Bishop Selwyn, Archdeacon Octavius Hadfield and Archdeacon Robert Maunsell,[23] especially after the government's attempts to recognize individual rights at Waitara and the resulting outbreak of war. Many of these commentators were rather vague in what they meant by 'tribe', and did not clearly distinguish the 'tribe' as iwi, hapū, community, or some other group.[24]

The actual nature of the subordinate individual rights proved more difficult to agree upon. The most widely accepted explanation of the humanitarian-influenced officials and churchmen, as given by Selwyn, his friend William Martin (New Zealand's first Chief Justice), Busby, the Chief Protector of Aborigines George Clarke Snr, and his New Zealand-raised son and Sub-protector, also George, was that individual rights were restricted to those parts of the tribal estate which the individual or family actually laboured upon, some sort of 'act of ownership' being necessary to distinguish areas held under an individual title from the general tribal estate. However, their rights were not exclusive in the European legal sense, in that they did not give any right to alienate without tribal consent. The commentators said that these personal rights were derived either by inheritance or chiefly grant, or by bringing into use previously

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[23] Maunsell arrived in New Zealand in 1835, Hadfield in 1839, and Selwyn in 1842. Hadfield and Maunsell in particular were firm opponents of the Taranaki war, although Maunsell supported the invasion of the Waikato, where he preached, in 1863. While based at Ōtaki, Hadfield's Māori friends and associates included Te Rauparaha and a number of Te Āti Awa originally from Taranaki. He therefore had many years' experience of working in an area recently subject to conquest and migration. DNZB vol. I, pp.169-170,285-286

[24] 'Further Papers Relative to the Native Insurrection', pp.5-6,60; 'Extracts from Opinions of Various Authorities', pp.4,8,15; Clarke, p.46; Colenso, pp.362,364; Nicholas, p.235; Shortland Maori Religion, pp.90-91; Richard Taylor, pp.384-385; Thomson, vol. I p.97

unused land or resources with the consent of the wider tribal group. Once an individual right was accepted by the tribe, that person could not be dispossessed except as a punishment or if they left the district and could not keep up the right. George Clarke Snr believed that rather than being a strictly individual right, the heads of individual families had rights over the areas used by the family for cultivation, fishing and the like. Other members of the family had a right to use the resource but its control was vested in the family head.[25]

Others writing before the wars saw more of a distinction between tribal and individual lands. Shortland believed that much of the land was made up of individual rather than tribal "estates". He maintained that the chiefs were the main "land holders", who had the right to apportion their lands amongst the other members of the tribe. The ordinary tribal members, or more usually families, derived a "hereditary title" and "rights" from these apportionments, which they could exercise to the exclusion of the rest of the tribe. Even those lands over which many of the tribe had a joint title were often subject to the rights of various individuals. In his later writings, however, Shortland did distinguish between lands "appropriated" by families and individuals, and the greater tribal estate (rather than restating his earlier belief in chiefly ownership).[26]

There was also a Pākehā interest in the ways that land rights could be obtained other than by ancestry or the acquisition of a resource within the tribal 'estate'. Colenso recounted the circumstances in which a chief might appropriate the produce of the land rather than the land itself:

> A man of middle or low rank caught, perhaps, some fine fish, or was lucky in snaring birds; such were undoubtedly his own, but, if his superior or elder chief wished or asked for some, he dared not refuse, even if he would. At the same time such a gift, if gift it might be termed, was (according to custom) sure to be repaid with interest, hence it was readily yielded.[27]

Colenso and others were agreed on other ways in which the appropriation might take place. A chief of great mana could appropriate a resource or object to himself by naming it after himself or one of his ancestors, thus rendering it tapu. This prevented others from using it, at the risk of

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[25] 'Further Papers Relative to the Native Insurrection', pp.5-6,8; 'Extracts from Opinions of Various Authorities', pp.4,8,10-11; Clarke, p.46; Thomson, vol. I p.97

[26] 'Extracts from Opinions of Various Authorities', p.11; Shortland Traditions and Superstitions, pp.279-280; Shortland Southern Districts, p.291; *cf.* Shortland Maori Religion, p.91

[27] Colenso, p.361

physical and spiritual violence, and obliged his descendants to keep up the right. None of the commentators said whether this applied only within the chief's own district, or beyond it also. Land and other things within the general tribal estate could also be appropriated if made tapu by the shedding of a person's blood or loss of life in war. According to Shortland, land was often given as compensation to the party which had suffered the greatest losses in any conflict, or could be claimed by the relatives of a person killed on it. He also stated that land was sometimes given as recompense for adultery.[28]

The question of the nature of land gifts, and their implications for land dealings with Pākehā, interested many Pākehā commentators in this pre-war period, especially as Māori often gifted rather than sold land for early churches and schools. There was uncertainty over whether customary gifts were in the nature of permanent alienation or whether the donor retained some rights. Canterbury missionary James Stack wrote, "Land was sometimes given as a place of residence by one *hapu* to another, and sometimes to persons of different tribes; but it seems doubtful whether it was given so in perpetuity", while Colenso wrote of "transfers (gifts or sales)".[29] It was, however, agreed that valid gifts had to be made publicly by those with authority over the land, and unopposed by those affected by the decision. The donees forfeited their rights if they left the land, and they could not gift it in turn to anyone except the original owners. It was said that the original arrangement might be remembered by the gifting of produce from the land to the original owners.[30]

Another aspect of the control over and the disposition of land which particularly interested early Pākehā observers was the process of dispute resolution. Shortland recorded that in the case of disputes within an iwi, discussions were held to debate the issue. Whakapapa would be traced and *take* (bases to rights) put forward, then any acts of ownership which had taken place on the land would be discussed. He referred to the genealogical experts who acted in

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[28] ibid. p.362; 'Extracts from Opinions of Various Authorities', p.8; 'Opinions of Various Authorities', p.23; Shortland Traditions and Superstitions, p.296; Shortland Maori Religion, p.92; Shortland Southern Districts, p.291; Richard Taylor, pp.56,60

[29] 'Opinions of Various Authorities', p.22; Colenso, p.362

[30] 'Extracts from Opinions of Various Authorities', p.14; Colenso, p.362; Shortland Southern Districts, pp.284-285; Thomson, vol. I p.267; Yate, pp.103-104

these cases as expert witnesses, so to speak, as "native lawyers".[31] Ensign Best witnessed this process at work in 1842, when two parties fighting over a piece of land (consisting of a small island, a *pā tuna* or eel weir, and a small kūmara plantation) came together to discuss the dispute. One of the chiefs offered to compromise by surrendering his right to the island and the 'eel *pā*', but the other was unwilling to surrender any part of his claim.[32] Jerningham Wakefield witnessed the giving of *utu* (in this case material compensation) to a man whose wife had committed adultery, the goods being provided by the family of the wife's lover, who had since died.[33] While not always successful in solving disputes, it was believed that such talks often prevented bloodshed by establishing, in public, that one side had a better case, or by allowing the disputants to come to some arrangement.

The belief in a common dispute resolution process conflicted with other common beliefs regarding 'conquest' and its role in customary tenure. Along with a concentration on alienation, conquest or *take raupatu* as a source of land rights was an early Pākehā fixation. Many of the earliest European residents in New Zealand had seen a great deal of Māori military action, which confirmed their view of Māori as a warlike people. Many paid considerable attention to this aspect of Māori tenure in their writings. There was a great deal of fighting in the early decades of the nineteenth century, triggered by a variety of factors such as the uneven introduction of new technology, a desire for the benefits of trade with Pākehā, and resource shortages. Not all of this fighting led to 'conquest', as raids rather than invasions might be directed towards the acquisition of prisoners or other portable resources, and did not lead to a change in land 'ownership'.

Most commentators believed a distinction was always made by Māori between those lands acquired by conquest and those which were derived by uninterrupted ancestral possession or *take tupuna,* and saw the title to the conquered lands as much more tenuous. It was agreed that it was not enough simply to defeat an opponent in battle to effect a conquest of their lands. For a conquest to be complete the losers had to be entirely killed or driven permanently from the land, and the land then had to be physically occupied or at least utilized by the conquerors to the

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[31] Shortland Southern Districts, p.96; Shortland Traditions and Superstitions, pp.307-308; 'Extracts from Opinions of Various Authorities', p.12; see also Thomson, vol. I p.124

[32] A.D.W. Best, p.348

[33] Wakefield, p.424

exclusion of the previous owners. They believed conquests conferred a title only so long as the conqueror was able to hold the land.[34]

Occasions were recounted when an invading *taua* (war party) was able to defeat their opponents but not to effect their extinction or complete expulsion. In this case, it was said, the conquerors might occupy the land alongside the remnant of the conquered people, who would find themselves in the position of 'clients' on the land. They would continue to work the land, but for the benefit of their new masters rather than themselves, reserving for the newcomers the best foodstuffs and other products of the land.[35] However, none of the commentators in this pre-war period discussed what happened over the next few generations as the two groups intermarried. Shortland published an account of such an incomplete conquest given to him by William Thompson (Wīremu Tamehana Tarapipipi Te Waharoa). This account stated that the people so conquered were reduced to slaves, who would never consider trying to regain their rights regardless of their numbers; but as Shortland noted, William Thompson was a conqueror rather than a casualty, so "his sentiments therefore have a natural bias in favour of the sole right to the land of the conquered tribe being with their conquerors."[36]

In 1856 Governor Gore Browne, who still had control over 'native policy' despite the transition to responsible government,[37] called together a board "to enquire into and report upon the state of native affairs". This board, after taking evidence from thirty-four people including nine Māori, prefaced its report with a brief summary of 'native title'. This provides a useful précis of the state of Pākehā preoccupations and opinions on Māori tenure in the period just before the outbreak of the New Zealand Wars between Māori and the Crown. It found that "title or claim to land" arose either from long-term occupation or more recent conquest, and that title existed only so long as it could be defended. It said that all land was "claimed" by someone, and

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34 'Extracts from Opinions of Various Authorities', pp.8,11-12; 'Opinions of Various Authorities', p.22; Clarke, pp.46-47; W. Tyrone Power Sketches in New Zealand with Pen and Pencil London: Longman, Brown, Green and Longmans, 1849, pp.132-133; Shortland Maori Religion, pp.95-96; Shortland Traditions and Superstitions, pp.272,276,307; Yate, p.103

35 Shortland Traditions and Superstitions, p.280; Shortland Southern Districts, pp.100-101; Thomson, vol. I p.148

36 Shortland Maori Religion, p.95. This comment was published in 1882, but Shortland had used William Thompson's statement without attribution as early as 1856, and made similar comment on it —Traditions and Superstitions, pp.272-273,276.

37 See page 51 note 8 *supra*, and page 63 *infra*.

that some boundaries were clearly defined while others were the subject of controversy and usually left unused. As land could be inherited through either parent, many people had "claims" with more than one tribe. It also found that lands could be gifted in return for services rendered, or as compensation. Within the lands of each "tribe", individuals had a "right in common" as well as an "individual right" to those parts used by the family for residence, cultivation and the like, but this did not allow any right of alienation to Pākehā. While chiefs had an influence over land alienations, their individual rights were the same as any other tribal member's. The board found, "Generally there is no such thing as an individual claim, clear and independent of the tribal right." Fisheries were not mentioned.[38]

Those pre-war observers who did make specific mention of fisheries usually realized the importance of the freshwater resource to many Māori tribes, but the examples given by them were made largely within the context of discussion of general land tenure and were used to reinforce points made about land, rather than focussing on fisheries as a separate point of discussion. The importance of fisheries, particularly eel fisheries, is indicated by the number of occasions on which conflicts over these resources were recorded. In his travels to the thermal lake region, New Zealand's first colonial-surgeon John Johnson noticed numerous '*pa te tuna*' (eel weirs) on the Maungapiko [*recte* Mangapiko] Stream, and commented, "This right of fishing is often a source of quarrel, even among families of the same tribe, and has given rise to many bloody encounters, and it makes them set a value on land, which to all appearance is useless."[39] While only a newly-arrived European could regard a stream full of eels as apparently worthless, he recognized its value to Māori. Others also gave similar accounts of disagreements or blood-shed which involved the disputed possession of a valued fishing resource.[40]

Use of a fishery by a person or their ancestors, especially the construction of eel weirs, was one of the most commonly cited 'acts of ownership', which Pākehā observers of this period regarded as necessary to validate a claim to title over a particular area of land. Martin, George Clarke Snr, and Shortland all referred in the 1840s to the use of eel weirs as an act of ownership

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[38] 'Report of a Board Appointed by His Excellency the Governor to enquire into and report upon the State of Native Affairs' 1856 House of Representatives, pp.2-4, Appendix p.1

[39] Johnson, p.141

[40] A.D.W. Best, p.348; Power, pp.132-133; Shortland Traditions and Superstitions, pp.274-275; Orange, p.187

along with cultivation, digging fern root, catching rats or birds, cutting down trees, or building a house.[41]

These early observers did not however limit the place of fisheries in Māori tenure solely to serving as proof of ownership of the surrounding land. Many saw fisheries as a type of property, which could be dealt with in the same way as other types of property such as land, and thus most believed that fishing rights could be exercised at either a tribal or individual level. Examples were given of a common or a tribal right, such as the construction of a large eel weir by a large group, or the tribal divisions seen by Nicholas in the fisheries of the tidal waters of the Bay of Islands. Taylor believed that tribal members usually also had a general right of fishery over the unappropriated parts of the waterways on the tribal lands; while Shortland wrote that what started out as an individual right to a fishery might turn into a common right over generations if the bulk of the first user's descendants kept up their ancestral rights at the fishery.[42] Smaller eel weirs and fishing stands could be the personal property of a family or of an individual — Shortland had his archetypal dying chief willing his eel weirs to his sons on his deathbed along with his potatoes, his pigs and his slaves.[43]

William Colenso seems to have been one of the first Pākehā commentators to raise the idea that there could be some sort of fishing right which applied only to the resource and which was separable from the lands or the waters. He divided this into permanent and temporary "usufruct rights", a permanent right applying to a site such as an eel weir which could be used throughout the year, while a temporary right applied to a seasonal resource such as the inanga fishery. Those who held a temporary right would indicate to others the times when they were exercising their right by erecting a pole. The usufructuary right differed from a right to the waters in general because more than one usufructuary right could be applied to one single area:

> Sometimes there would be a double right to the usufruct of the same estate — i.e. one man or family would have the right to the eels, another to the ducks.... Those

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41 'Extracts from Opinions of Various Authorities', pp.4,8; Shortland Traditions and Superstitions, pp.296,307-308

42 Colenso, p.364; Nicholas, p.135; Shortland Traditions and Superstitions, pp.274-275; Richard Taylor, pp.384-385

43 Shortland Traditions and Superstitions, pp.271-272

> permanent usufruct rights often originated in transfers or gifts, and generally continued in the first line of descent.[44]

Colenso was one of the few nineteenth century observers to attempt to explain these sorts of rights, although he too was obliged to use terms borrowed from English legal property rights concepts. This posed a great deal more difficulty to most other commentators, who could only conceive Māori rights by analogy to English legal concepts. In the case of fisheries, this was often highly unsuitable.

The War years and changing Pākehā views of Māori rights

The perceptions of Māori society and land tenure held by Pākehā in the early stages of settlement in New Zealand were thoroughly shaken by increasing tension over land dealings and political authority in the late 1850s, which culminated in the outbreak of war at Waitara in 1860. The Taranaki campaign of 1860-61 was followed by the Waikato and Bay of Plenty campaigns of 1863-65 and further war in Taranaki and Whanganui from 1863 to 1869, while localized fighting continued throughout much of the North Island until 1872, when Te Kooti finally withdrew into the King Country. Full responsibility for 'native policy' was transferred from the control of Governor Grey to the New Zealand ministry in 1862, although the legislature had been able to pass laws relating to Māori since the first sitting of the General Assembly in 1854 and the advent of responsible government in 1856. These constitutional developments gave settlers even greater ability to determine the course of Māori-Pākehā relations.[45]

The outbreak of war in New Zealand came on the heels of the Indian Mutiny of 1857, and as war continued throughout the 1860s the settlers were also confronted with the example of the 1865 rebellion in Jamaica. This injected a growing element of fear into Pākehā relations with

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[44] Colenso, p.363. Colenso was using the term 'usufruct' to refer to rights held amongst themselves by different Māori groups, not to refer to the nature of Māori rights generally, as some other writers have done. See pages 22-23,41-42 *supra*.

[45] Dalton, pp.151-159,171-175; see also page 51 note 8 *supra*. Before the transfer of authority, Governor Gore Browne had successfully opposed some bills, including the Native Territorial Rights Bill of 1858 which sought to encourage the individualization of title to Māori land.

Māori, and it brought home to the settlers that their security rested as much on outward show as on actual power. It was not a climate likely to encourage Pākehā tolerance of Māori land rights.[46]

These imperial developments coincided with changes in European conceptions of 'race'. Pseudo-scientific research in a range of fields, such as philology and craniology, used subjective criteria which encouraged belief in the innate superiority of the Anglo-Saxon 'race'. Coupled with a belief in the inability of 'native races' to improve themselves and a limited ability to adapt, this new atmosphere encouraged the view that the position of the English as the rulers of a significant portion of the world's population was justified. While Māori were regarded as one of the 'inferior races', they were ranked highly on the English hierarchy of non-European peoples.[47]

It had long been observed that indigenous populations tended to decline upon their contact with Western powers, and this was now held to be another sign of their innate inferiority. Many of the causes of this decline, such as the lack of resistance to new diseases, were poorly understood and barely acknowledged until at least the 1860s. The effects of this process were known as 'fatal impact', and covered consequences from total extinction (as supposedly happened to the Tasmanian Aborigines) to assimilation in the case of peoples considered more resilient. In later years, popular ideas of Social Darwinism and 'survival of the fittest' were drawn from the works of Charles Darwin and Herbert Spencer. In English eyes, the 'fittest races' were the white ones, more particularly the Anglo-Saxons, who had shown their ability to adapt and colonize throughout the world. The principles of these newly-developed biological concepts were overlaid onto the much older tenets of 'fatal impact'. The idea that Māori extinction or displacement was scientifically predetermined had considerable following in New Zealand even prior to the publication of Darwin's work, and persisted for some decades afterwards.[48]

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[46] 'Further Papers Relative to the Taranaki Question' AJHR 1861 E-2, p.39; Belich The New Zealand Wars, p.229; Bolt, pp.x-xi; Hyam, pp.155,301-305

[47] Bathgate, p.254; James Belich Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century Auckland: Allen Lane/The Penguin Press, 1996, pp.124-126,295-297; Belich The New Zealand Wars, pp.300,304,310,321-327; Bolt, pp.ix,1-7,11-14,17,24-27,185,208; Hyam, pp.75-76,88-90,121,156-157; Miller, pp.77,103; Sorrenson Maori Origins, pp.11-13; Nancy Stepan The Idea of Race in Science: Great Britain, 1800-1960 London: Macmillan, 1982, pp.9-10,25-26,39-46,54-57; Winks, pp.13,42

[48] Belich Making Peoples, pp.126-127,247-249; Belich The New Zealand Wars, pp.299,322-325; Bolt, pp.10-11,20-21; Ross Galbreath Walter Buller: The Reluctant Conservationist Wellington: GP Books, 1989, pp.44-45,81,121,137-140,165; Hyam, pp.76,155-157; Miller, pp.97,103-104,155-156; Sorrenson Maori Origins, pp.17,73; Stepan, pp.57,69,83-86; Winks, pp.21,27. Charles Darwin's On the Origin of Species by Means of Natural Selection was published in 1859, and was available and being read and reviewed in New Zealand by 1860.

An increasingly strong body of settler opinion developed during and immediately after the Wars in New Zealand which held that Māori were unregenerate, barbaric, and resistant to civilization. Examples of 'savage' behaviour from Māori fighters in the wars were accorded far greater circulation than their military triumphs, or examples of atrocities committed by British troops. Many of the harshest critics of the Māori people occupied important positions — Alfred Domett's ministry, at the prompting of Governor George Grey, declared its intention to confiscate the land of any Waikato Māori who raised arms against the Crown, and then deliberately invaded their territory. Plans for the settlement and sale of confiscated land were under way before the land was even taken; and the New Zealand Settlements Act, 1863, contained draconian measures for confiscation of tribal land even if only a few individual members of the tribe had fought the Crown or encouraged those who had fought.[49] Even after the wars, Chief Justice James Prendergast (the man whose actions as Attorney-General were later described as "uncompromising, if not ruthless ... towards Maori") referred to Māori as "primitive barbarians" in his well-known *Wi Parata* v *The Bishop of Wellington* judgment of 1877.[50] Some tolerant attitudes did however remain, even among politicians. This was encouraged towards the end of the century by the belief among a number of scholars that the Māori, like the Anglo-Saxon, sprang originally from Aryan stock, and that Māori could therefore eventually be successfully assimilated with their long-lost European cousins.[51]

Most of the valuable farming land moved from Māori to Pākehā lands between 1840 and 1900, through the concerted efforts of Crown purchase agents, the massive confiscations which followed the New Zealand Wars, the activities of the Native Land Court and the effects of other Māori land legislation, and the purchases made by individual settlers. As a result the racial issue became of much lesser importance, especially as the increase in the Pākehā population far outstripped that of Māori, leaving them a marginalized minority. From the turn of the century

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[49] Dalton, pp.175-182,188-189; Orange, pp.136-137,166-170; Ward, pp.161-164,169-170. This Act was reserved by Governor George Grey for the Royal Assent, which was eventually granted, but in any case it was put into operation immediately after passage.

[50] *Wi Parata* v *The Bishop of Wellington* 3 NZ Jur 72 at 78; A.W.B. Simpson The Biographical Dictionary of Common Law London: Butterworths, 1984, pp.435-436. This judgment found the Treaty of Waitangi to be a "legal nullity", which was in line with the contemporary legal orthodoxy of legal positivism, but his views on the state of traditional Māori society now seem unduly harsh.

[51] Te Awekotuku, p.10; Belich The New Zealand Wars, pp.300,310,330; Sorrenson Maori Origins, pp.16-22,29; Stepan, pp.98-100

Māori customary tenure and the issues raised by it fell from Pākehā political and legal consideration.

The major impact of the outbreak of war in 1860, in terms of perceptions of Māori land and resource rights, was to focus attention on only those aspects of these rights which had implications for the issues at the centre of the outbreak of hostilities. One of the most widely discussed issues of the war years was the relative rights of chiefs, individuals, and tribal opinion when it came of the alienation of land. This concentration on alienation rights did not begin suddenly in 1860, but became much more intense as troops and money were committed. Thus the discussion in the war years, while claiming to be centred on the nature of customary Māori tenure, was more focussed on land dealings between Pākehā and Māori than on customary tenure and rights amongst Māori themselves.

The predominance of the law of force over peaceful dealings, and the lack of anything approaching a uniform body of rules or laws of Māori tenure, was emphasized by many in the early 1860s. Governor Gore Browne wrote in exasperation and self-defence to the Colonial Secretary in London in December 1860, saying that:

> The result of all these enquiries [Gore Browne had collected the opinions of numerous officials and missionaries on Māori tenure, in light of the Waitara situation] has certainly not been to present a very clear idea of what Native Title is, and still less of what it is not.

Gore Browne quoted approvingly from the speech of Chief Land Purchase Commissioner Donald McLean to the Māori chiefs who had been called by the government to a meeting at Kohimārama in July 1860:

> No fixed law on the subject [of their lands] could be said to exist, except the law of Might. It was true that various customs relating to Native Tenure existed; but these were not in any way permanent; and the endless complications of such customs were eventually resolved into the law of might.[52]

Governor Gore Browne maintained that McLean's words had been "contradicted by none", but some observers did protest against this politically convenient orthodoxy which could be seen to imply that by using force to take land, the Government was acting in accordance with Māori custom. In a pamphlet repudiating government policy over the war, Sir William Martin asserted that there were some rules which were generally accepted and observed; although these

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[52] 'Further Papers Relative to the Native Insurrection', pp.5-7

were sometimes broken through the use of force, this did not mean that the existence of the rule was negated or forgotten. Martin and his views were attacked in turn by Busby and the South Island settler politician Frederick Weld, both of whom had a vested interest in the extension of Crown authority and the acquisition of land for settlement. It is doubtful whether Weld in particular had much practical experience of Māori tenure, although this did not prevent him from holding the post of Native Minister from November 1860 to July 1861.[53]

Even the most resolute purchasers of Māori land maintained that tribal title was the basis to Māori tenure, although they often appeared to act in a contrary manner — most notably at Waitara. McLean wrote to Gore Browne in late 1860, declaring: "nor have I, in any way, recognized the right of an individual Maori to alienate land which was held in common by his tribe".[54] It was held by various authorities that all members of the 'tribe' had a right to exploit the unappropriated portions of this tribal territory and a say in the issues affecting the land (particularly those relating to its disposal). There was however no clear consensus on whether this 'tribal' right was vested in the iwi, the hapū, or any of the other various designations such as community, clan, and family, which were used to describe Māori tribes. Many Pākehā commentators had a particular interest in the unappropriated or 'waste' lands of the tribe, as they often saw them as under-utilized and therefore surplus to Māori requirements, when judged by Pākehā criteria.[55]

After the outbreak of war, the rights of the individual to land were still seen by most Pākehā commentators to be largely restricted to those areas which people or their immediate families used for some particular purpose, such as cultivation, fishing, food gathering, or housing. The early student of Māori society John White took this model further:

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[53] 'Further Papers Relative to the Taranaki Question', pp.2,40,42,68. It is unlikely that Weld, an aristocratic Marlborough pastoralist, had much contact with Māori except for the short time he spent in the Wairarapa on arrival in New Zealand. DNZB vol. 1, pp.579-580

[54] 'Further Papers Relative to the Native Insurrection', p.61

[55] 'Evidence Relative to the Origin of the Native Insurrection', p.22; 'Extracts from Opinions of Various Authorities', pp.4-5,10; 'Further Papers Relative to the Taranaki Question', pp.1-2,42,46; 'Memorandum by Mr. Richmond in reply to a Pamphlet by Sir W. Martin, D.C.L., on the Taranaki Question' AJHR 1861 E-2, p.6; 'Lectures on Maori Customs and Superstitions Delivered in the Mechanics' Institute, Auckland, by John White' AJHR 1861 E-7, pp.37,44; 'Papers Relating to Sitting of Compensation Court at New Plymouth' AJHR 1866 A-13, pp.3,9

> The lands of a tribe were portioned out according to the number of families of which it consisted, and were claimed by each family as its own; nor did anyone meddle with it or occupy the land of another family without express permission.[56]

The implication of this is that the entire tribal estate was subdivided into whānau portions, rather than just small areas under cultivation or used for other sorts of resource exploitation.

It was generally held that these individual or family rights could be inherited from an ancestor, or acquired by appropriation of part of the 'waste' tribal lands without opposition from other tribal members. Although many distinguished the land over which there were individual rights from the communal parts of the tribal estate, in most cases this individual right was not seen to be completely independent from the tribal right. It was seen to be exclusive in the sense that no other members of the tribe could rightfully usurp another's rights to exploit or occupy without their permission; but there was no independent right of disposal or alienation, and the land would pass back to the tribe if abandoned by the individual or family.[57] While there was a consensus on the tribal nature of title, this form of title was not seen as desirable, and later government policy (through the New Zealand Settlements Act and the Native Land Court) was directed towards the individualization of Māori title.

This tendency for Māori tenure to be seen in Pākehā terms was reflected in Governor Gore Browne's discussion of "seignorial right" in reference to the outbreak of war in Taranaki in his dispatches to the Secretary of State for Colonies in London in late 1860. Gore Browne was caught between his responsibilities as protector of Māori interests and the vociferous demands of the settlers (who now had their own parliamentary assembly and responsible government) who wanted more and better land. When he failed to walk this tightrope at Waitara and the situation exploded into war, he felt the need to justify his position to London in these comprehensive dispatches, which drew on the opinions of a wide range of prominent Pākehā, mostly churchmen and officials. Gore Browne's use of terms like 'seignorial right' could not but draw a parallel between Māori tenure and the European feudal system, with all its ideas of power vesting in a land-owning nobility. After weighing the opinions of his informants on the subject, the Governor did however come to the conclusion that the powers of individual chiefs depended very much on

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[56] 'Further Papers Relative to the Native Insurrection', p.6

[57] ibid.; 'Extracts from Opinions of Various Authorities', pp.4, 10; 'Further Papers Relative to the Taranaki Question', pp.1,43; 'Lectures on Maori Customs', p.37; 'Papers Relating to ... Compensation Court', p.3

their personal attributes, and that the public expression of the idea of a 'seignorial right' allowing chiefs a sovereign rights over land was a post-War phenomenon.[58] This was hardly a startling conclusion given the issues which had prompted war at Waitara, namely, whether individuals had personal rights which they could dispose of without community consent, and whether chiefs had the right to prevent such individual transactions.

This belief in restricted rights for chiefs when it came to land dealings was supported more generally by other observers. As John White told his audience in 1859, chiefs could only act to the extent that their people allowed them, and:

> Europeans expect more to be done by chiefs of Maori tribes than ever these admit themselves to possess. I may confidently say there never was, or is now, a chief in New Zealand who can order any one in his tribe (slaves excepted).[59]

Yet many writers, including White himself, cited examples of chiefly exercises of authority such as the appropriation of resources, as had observers in the pre-War era. White spoke of this process as applied to an eel fishery:

> One of the Waikato tribe, whose district was famed for the eels it produced, invited a chief of another tribe on an eel-catching expedition; during the sport the invited chief was so pleased with the quantity of eels taken, that he took a bunch of albatross feathers called "Pohoi" from his ear, and cast it into the stream: as the owners of the fishery did not immediately object to this, his descendants are now allowed a claim not only to the land but to the eels taken there.[60]

White did not seem to see the contrast between this example of chiefly mana at work (as demonstrated by both chiefs) and other comments about the restricted role of chiefs in land matters.

The discussion of the nature of mana also continued from the pre-War years, and in keeping with the concentration on the issues of war, the place of *mana tangata* or authority over people was widely discussed. White distinguished between the highly spiritual mana of the priest, which existed on account of the gods, and the mana of the *ariki*, which derived from superior birth and education.[61] The Pākehā-Māori settler F.E. Maning, writing in 1863, believed he knew

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58 'Further Papers Relative to the Native Insurrection', pp.1-25; see especially pp.8-9,24-25

59 'Lectures on Maori Customs', p.47. While White's series of lectures took place in late 1859 in Auckland, while tensions were growing over the Waitara purchase but several months before the outbreak of war, they were tabled in Parliament amongst other documents concerning the war and Māori tenure, and are presumably reflective of Pākehā thought in the period of increasing inter-racial tension immediately preceding the outbreak of war. The sources of the specific examples he quoted in his lectures are largely unattributed.

60 ibid. pp.39,47

61 ibid. pp.41-42

the several meanings of the word mana but found it difficult to explain them. He recognized it as a supernatural quality attaching to both people and things, and also:

> *Mana*, in another sense, is the accompaniment of power, but not power itself; nor is it, even in this sense, exactly authority, according to the strict meaning of that word, though it comes very near it. This is the chief's *mana*: Let him lose the power and the *mana* is gone; but mind you do not translate *mana* as power; that will not do; they are two different things entirely. Of this nature also is the *mana* of a tribe; but this is not considered to be the supernatural kind of *mana*.[62]

One area of thought in which there was a great degree of continuity before and after the wars was on the derivation of title. As before, the most convincing *take* or title to land was seen to be the uninterrupted occupation of ancestral lands by the tribal group. The greatest difference, one of degree rather than substance, was that the war-time commentators gave much greater stress to the vulnerability of ancestral title to conquest. This emphasis on the fragility of customary Māori tenure may have been a subconscious justification of the seizure of large areas of Māori land by force in this period. Many commentators also developed further some of the themes of derivation of title, building on the framework developed by pre-war observers. Some of these themes included the workings of personal inheritance, especially inheritance by women; the nature of gifts of land; and the nature of the relative rights of victor and vanquished on lands where conquests had not been complete. Many of these themes are reflective of the new emphasis given to the place of individual rights in customary Māori tenure.

Many of the observers of the late 1850s and 1860s believed that descendants in the female line could only retain interests in the lands of their ancestors for a few generations, or until they left the district. After that, their rights would revert to those branches of the family descended from men. Pākehā views in this respect were probably coloured by the subordinate status of women in English land tenure, and did not take into account what happened when descendants in the female line remained on the same land over several generations. In the case of rights acquired from intermarriage, the war-time observers seem to have put less emphasis on the

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[62] 'Opinions of Various Authorities', pp.14-15. Maning came to New Zealand in 1833, and became one of the original Native Land Court judges in 1865. He was noted for his hawkish attitude to the war in Taranaki: DNZB vol. 1, pp.265-266

need for people living away from ancestral land to keep up their rights through usage, and they tended to posit firm rules on who could and could not inherit these rights.[63]

White wrote of hereditary tenure being based on the rights of a grandparent rather than parent, as interests could pass to people's siblings rather than to their children, or to both jointly. He felt that inheritors in the male line always had a right so long as they could prove their ancestry, and there had not been a "family war" in the meantime to split the tribe; but in the female line:

> The grand-daughter of a chief has an equal claim in the lands of her grand-father, with that of her male cousins, and the claim continues good to her grand-child; but on the death of that grand-child the land reverts to the male line of the second generation, from the male ancestor from whom they claim.... [because] the inter-marriage with daughters of chiefs with members of other tribes would so soon complicate and curtail the tribal claims...[64]

White did not discuss whether the interests of those who were not 'chiefs', or of those who married back into the tribe, were dealt with in a different manner.

Pākehā continued to distinguish between title derived from unbroken occupation of ancestral lands and lands acquired by other methods such as gift or conquest. White expanded upon the circumstances under which gifts might be made, in an example which cited a gift of usufructuary rights which was able to be maintained on a hereditary basis:

> ...in some instances, however, the land was not fully given to the assisting tribes; sometimes only the right of fishing or hunting was granted, and in order that the owners of the district might keep the "mana" or right to the land, the tribe who had received permission to fish or hunt had to render the proceeds of their first day's sport to the owners of the land.[65]

These sorts of gifts, he said, were made in return for services rendered in war.

Given the circumstances of the Crown invasion of Taranaki and then Waikato, the whole area of conquest was another in which greatly interested Pākehā commentators, and as with other forms of *take* there was a continuity of opinion from the pre-War period. However, there is less evidence in the war years of commentators distinguishing between occupation to the

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63 'Extracts from Opinions of Various Authorities', p.10; 'Further Papers Relative to the Taranaki Question', pp.1-2; 'Lectures on Maori Customs', pp.35-37; 'Opinions of Various Authorities', p.17

64 'Lectures on Maori Customs', pp.36-37

65 ibid. pp.39-40

exclusion of the defeated party and occupation alongside a remnant of those original owners. Whereas earlier observers thought that many rights were retained by the vanquished party so long as they could keep some occupants on the land, such rights were now rejected by authorities such as McLean, who thought them the result of the introduction of Christianity and English law, and the subsequent abandonment of slavery.[66] This may be a reflection of the difficulties officials met in juggling conflicting claims in areas where there had been invasion and settlement, but not complete destruction, and where mingling of *take* through intermarriage had not yet taken place. This view was also politically convenient, and the contention that conquests without complete destruction were a common and accepted part of Māori land tenure may well have also been a veiled or subconscious attempt to justify the scale of Pākehā confiscation of Māori land.

The idea that a 'partially conquered' people had a client relationship on the land alongside their conquerors did survive in the minds of some commentators of this period. According to White, those taken as 'slaves' or prisoners might be resettled on their old lands as clients by their conquerors, owing them tribute from the land in the form of its choicest produce or military service, while those who managed to avoid being driven completely from the land or taken as slaves retained title. He expressed this through the phrase "I kā tonu taku ahi i runga i taku whenua" (my fire burns still over my land), an early Pākehā citation of the idea of *ahi kā* or continuous occupation, which was to feature so prominently in later discussion of Māori rights, especially in the Native Land Court.[67]

With the emphasis being placed firmly on questions of land rights and alienation, few of the political observers of the 1860s paid much heed to the subject of fisheries, especially freshwater fisheries which, unlike land, had little value to Pākehā. One of the few people who did write much about fisheries was John White, who applied a more scholarly bent to contemporary political concerns (although he did become a resident magistrate in the 1860s). The exceptions to official neglect were, naturally, when the fisheries had some value by virtue of their situation. A prime example of this is the discussion of fishing rights over the gold-bearing tidal mudflats in the

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66 'Further Papers Relative to the Native Insurrection', p.16; 'Extracts from Opinions of Various Authorities', p.3

67 'Extracts from Opinions of Various Authorities', p.13; 'Lectures on Maori Customs', pp.37,44

Hauraki Gulf.[68] Where fisheries were mentioned in other contexts, it was usually in passing as an illustration of general points of land tenure.

White examined fisheries in much greater detail, emphasizing their importance as part of the resource cycle of tribal lands, by which the people of the land not only sustained themselves but became highly familiar with the land itself, its boundaries, its features, and its history. He said that Ngāti Whātua's unopposed and unmodified exercise of fishing rights in the territory they had taken around Auckland from Tainui and Ngāti Paoa was an indication of their independence from the earlier owners of the land. He also alluded to the hereditary nature of many eel weirs: "Where a creek was the dividing boundary this was occupied with eel dams.... generations might pass, and each put the eel-baskets down by the carved and red-ochred Totara post which its ancestors had placed there."[69]

White was one of the few to consider other aspects of fishing rights, such as the *rāhui* or prohibition which would be imposed over the taking of produce from waters in which a chief had drowned, on the demand of his relatives. If this *rāhui* was not respected, "the relatives of the drowned chief then claim an equal right to the land." Specific examples were also given of circumstances in which fisheries or fishing rights might change hands — his accounts of the appropriation of a favoured fishing area by a visiting chief, and the grant of usufructuary rights to fish to an outside group, have already been quoted. He also added that travellers and other temporary visitors taking eels for sustenance would recognized the mana of the occupants of the land by giving to the owners any particularly large eels which they had caught there, along with the heads of all the eels taken.[70]

The Native Land Court and Māori fishing rights

The establishment of the Native Land Court in 1865 marked a new stage in the development of Pākehā interpretations of Māori fishing rights. The legislation under which the Court worked, and some issues related to its practices, will be examined more fully in the next

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[68] See page 84 *infra*.

[69] 'Lectures on Maori Customs', pp.35,44

[70] ibid. pp.38-40,43; see pages 69,71 *supra*.

chapter; but as the Court operated within the general intellectual and political framework of nineteenth century New Zealand its opinions on freshwater fishing rights and Māori tenure in general will be examined here. The Court had its origins in the Wars of the early 1860s, as the government's failure to properly ascertain the owners of the Waitara block before proceeding with the purchase was widely recognized to have been a major contributing factor to the outbreak of war. The Taranaki conflict had highlighted the "invidious position" of the Crown, as both guarantor of justice to Māori and purchaser of Māori lands, and a solution was sought. Some anti-Government observers such as Hadfield had been campaigning for some time for the impartial ascertainment of title to Māori land, and with the passing of the Native Lands Act 1862 the Native Land Court machinery was established to undertake this task. However, the Court did not become fully operational until further legislation was passed in 1865.[71]

The Native Land Court was charged with the investigation of title to Māori land before it could be offered for sale, ensuring that Pākehā buyers (either private individuals or the Crown) would be able to buy from legally recognized Māori owners and only have to pay out once for the land. The Court was to identify Māori owners according to custom where possible, so its practices and judgments give a clear idea of the state of Pākehā judicial thought on Māori tenure. There were initially six Native Land Court judges, and they and their successors were appointed more for their experience in dealing with Māori than for their legal knowledge. Before appointment, most judges were involved in the processes of state as military officers, civil servants, or minor judicial officers — most commonly native land commissioners or resident magistrates, who were charged with mediating minor disputes between Māori and Pākehā and with introducing Pākehā law to disputes between Māori. Because of their background and authority, the judges became recognized experts on Māori tenure in political as well as legal circles, and their opinions were very influential in both fields. The judges were the agency through which Māori views on land tenure were presented to the Pākehā public.

While there was a certain consistency to the public face of the Court, judges did not always apply the Māori land laws in an equal and consistent way, and there was a considerable variation between judges of different background, temperament and beliefs. Some, like Fenton in

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[71] Octavius Hadfield One of England's Little Wars London: Williams & Norgate, 1860, pp.5-6,14-15,18-20; 'Evidence Relative to the Origin of the Native Insurrection', p.3; 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws' AJHR 1891 G-1, p.vi; 'The Maori Land Courts: Report of the Royal Commission of Inquiry' AJHR 1980 H-3, p.29; Norman Smith Native Custom and Law Affecting Native Land Wellington: Maori Purposes Fund Board, 1942, pp.5-6. See page 97 *infra*.

the 1860s and Von Sturmer in the 1890s, saw the Native Land Court primarily as the means to make more Māori land available for settlement; while others, like Robert Ward in the 1880s and 1890s, were much more scrupulous in applying the protective clauses of the law.[72] As well as the views put forward by the judges themselves, there were also a number of government reports and commissions in the 1870s, 1880s and 1890s which discussed Māori tenure and the ways it was perceived by the Court.

The Court did not, however, conduct its business or make its judgements in strict accord with the principles of customary Māori tenure. Its purpose was to investigate title to blocks of land and then to grant a Crown-derived title to those found to the owners, thereby extinguishing their customary title. It had been established to meet Pākehā rather than Māori imperatives, and the facilitation of alienation was an openly acknowledged aim of its empowering legislation. The little protection given to corporate tribal interests in the early legislation was removed in 1873, when the Court was required to completely individualize the title to land passing through the Court by including every person found entitled on the title deeds as an owner-in-common. The Court also determined ownership as of 1840, the date at which British sovereignty and therefore British law was established in New Zealand.[73] This meant that much of the evidence given was drawn from the contact period and not necessarily typical of customary tenure. The whole Court process, which drew heavily on English judicial models, also encouraged the codification of Māori tenure in terms of English law and the establishment of sets of rigid rules and a body of case law which judges used to determine questions of land and resource ownership.

The Court heard cases on application from Māori who claimed to be owners of defined blocks of land. The initial applicant was called the claimant, who usually made an application on behalf of his or her wider hapū or other kin group. In most cases there were one or more counter-claimants; often the claims of these different parties partially overlapped. Each party took its turn to present its evidence to the Court, and could be cross-examined by the other parties. While this forum allowed Māori to present evidence on their own terms to a certain extent, the preferences of judges were always taken into account when structuring a case. The Court

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[72] Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim (Wai 9) Wellington: Waitangi Tribunal, 1987, pp.32-34; Ward A Show of Justice, pp.186,213,304,333-334; see also pages 99-101,105,109, 120-121 *infra*.

[73] See pages 116-117 *infra*.

preferred cases based on *take tupuna* or ancestral rights; other acceptable forms of title included *take raupatu* or conquest, and *take tuku* or gift.

Once a prima facie case to *take tupuna* was shown through whakapapa, or other convincing evidence was given as to conquest or gift, judges required claimants to prove *ahi kā* or ongoing occupation. The Court gave great weight to physical occupation of the land in the form of houses and cultivations. Other forms of land use, such as rat-catching, birding, and fishing, were more commonly reduced to 'acts of ownership' — judges generally regarded activities like fishing as a reinforcement of land ownership, not a source of it. Judges applied these relative weightings to most of their judgments, and parties that had demonstrated a usage right such as a fishing right would not normally be granted title to the block if another party could prove physical occupation. At the most they might be granted a small relative interest. As a result of the Court's preferences, evidence presented by Māori tended to concentrate on proving firm ancestral connections by giving substantial whakapapa, the history of the physical occupation of the land, evidence of mana-enhancing battles fought on the block, and evidence of 'acts of ownership' such as birding and fishing. Legislation from 1873 onwards allowed judges to determine the relative shares of each successful claimant, which also led judges to consider the relative status of chiefs and others and the relevance of this to land and resource rights.

The powers of the chiefs with regard to land (most especially land alienation) were held by most Native Land Court judges to extend to a right of veto over alienations, and also to declare roads, resources and the like closed, in conjunction with other leading men of the tribe. The chiefs were believed to undertake these measures by virtue of their position as the representative of the tribe or *pater populi* and protector of its interests. The mana of the chiefs was both demonstrated and limited by the degree of influence over the people, as expressed by Judge Robert Ward:

> No one ever disputed the right of the chief to do these things [make presents of lands and resources]. The chief had power and might; and power and might were paramount then. The man did what he had power to do, and his power was as much as the people gave him and recognized.[74]

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[74] 'Native Land Laws Report', p.131. See also 'Opinions of Various Authorities', pp.15,20; Smith Native Custom and Law, p.78

The judges were united in their belief that mana was a personal quality which had no bearing on land ownership issues. Certainly it did not confer a title to land, a view summarized succinctly in 1890 by former Chief Judge F.D. Fenton: "None of the old Judges recognised such a thing as land *mana* as conferring a title to land recognisable by the Courts."[75]

Judge Alexander Mackay did however express the idea that mana over land could vest in an iwi or hapū, rather than an individual, in his judgment in the case of the Otaupuaroaro subdivision of the Tipua Mapunatea block on the shores of Wairarapa Moana: "The undisputed use and exercise of the rights of fishing would be proof therefore that the mana of the land was with the tribe or hapu exercising this right..."[76] It is notable however that this example of mana relating to land refers to a resource area used 'only' for fishing, as opposed to an occupied and cultivated area, and it also dates from well after the period in which the Court could actually grant title to a tribal group.[77]

The concentration of the Court on ownership as of 1840 led to much of the evidence being drawn from the immediately preceding period, when there was warfare and migration on a large scale throughout much of the country. The upheavals of this period were discussed at great length in the Court, which was therefore encouraged to give a great deal of credence to the legitimacy of the use of force in customary tenure. This also accorded with the important place given to conquest in the general Pākehā model of Māori tenure from the 1860s onwards.[78] Judges Fenton, Rogan and Monro of the Compensation Court (which exercised a function similar to that of the Native Land Court over territory confiscated by the Crown during and after the wars of the 1860s) set the tone in the Oakura case in 1866:

> The conclusions at which we have arrived, after our experience in the Compensation Court, and as members also of the Native Land Court, is that before the establishment of the British Government in 1840 the great rule which governed Maori rights to land was force...[79]

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[75] 'Opinions of Various Authorities', p.15

[76] Judgment, Otaupuaroaro, 9/4/1890, Wairarapa Native Land Court Minute Book [MB] 13, p.292

[77] See Chapter Six for a fuller discussion of the Tipua Mapunatea case.

[78] 'Opinions of Various Authorities', p.20; 'Native Land Laws Report', p.130; see page 72 *supra*.

[79] [Chief Judge F.D. Fenton] Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879 [Auckland: Native Land Court], 1879, p.9

The Court placed particular emphasis on the merits of conquest or *raupatu* as a convincing *take* or base on which a claim of rights to land could be posited, ranking it alongside descent from previous occupiers and gifted land as the only valid foundations for an unchallengeable title. This stemmed from the belief of leading Pākehā figures that Māori tenure was dominated by the rule of force. These conquests could involve fighting between subdivisions of the same tribe who did not live together, as well as outsiders.[80] This emphasis on conquest stemmed largely from the fact that the Court seems to have seen *take tupuna* and *take raupatu* as mutually exclusive sources of title. Very few judges ever commented that the title of a conquering party would need to be strengthened by intermarriage with the remnants of the conquered people, giving their descendants a dual source of title. Judges may well have taken this approach because so many of the conquests put before them had occurred within living memory, and there had not been time for this blending of title to take place. As a result, people of incoming tribes who appeared in the Court had to stress only one side of the equation, their *take raupatu*, as the Court would not recognize such recent arrivals as having any rights by *take tupuna*.

Over time the Court established a hierarchy of *take* by which the merits of the claims of rival parties could be assessed. On some occasions the remnant of a defeated people who remained on their old lands were considered by the Court to have only a subordinate right, as it was believed that their rights were lost or seriously eroded unless they had remained strong enough to continue to be a threat. This conflicted with the opinions of pre-war Pākehā observers, who had regarded title by conquest as incomplete unless the former occupants were expelled completely. In other cases judges rejected the notion that the weaker of two tribes sharing a given area was necessarily in an enslaved position unless there was clear evidence of conquest rather than mere oppression.[81]

It was apparent from early on that the circumstances under which title could be claimed by descent would be influenced by English rules of succession. It was clearly recognized that there was a great difference between Māori and Pākehā views of inheritance — Chief Judge

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80 'Opinions of Various Authorities', pp.18-19; Fenton, pp.9-10,87; Smith Native Custom and Law, p.54

81 'Opinions of Various Authorities', p.19; Fenton, p.76; Judge Gudgeon, Kopuraruwai/Koukourahi Judgment, in Alexander Mackay Papers on Native Tenure, pp.4-5,14

Fenton stated in the Papakura succession case of 1867 that, "it will be the duty of the Court ... to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of the English rules of descent, as can be secured without violently shocking Maori prejudices."[82] While this referred particularly to the administration of lands after their passage through the Court, the Court's willingness to Anglicize rules of descent must have influenced their approach to investigations of title. Judges were adamant that title to lands could be derived only by continued occupation through descent, or by conquest or gift, a principle which was clearly established by the time of the Orakei case in 1869. Anything else was known to the Court as 'he noho noa iho' or squatting.[83]

In the view of the Court, the tribal lands were passed down the succeeding generations of the tribe, which preserved them from outsiders. Within those lands, hereditary rights were generally seen to be limited to the use of the personal cultivations of a family, but it was not an indefeasible and exclusive right as under English law, as the title remained with the tribe. Tribal hereditary rights could be derived over time from unchallenged or uninterrupted occupation of land, whatever the original right had been.[84]

The Court's interpretation of this point differed from that of earlier Pākehā observers, as it used a firmly defined length of time, three generations, in assessing the merits of these claims. Judges Mackay and Scannell clearly enunciated the general policy in 1892, stating, "...it is necessary that any claim made should be supported by proof of occupation and use of the land by at least three generations immediately preceding and including the present claimants."[85] Judge Ward demonstrated its application to cases which rested solely on length of occupation, in his judgment on the Waharangi case:

> As to Rangitatau we think he acquired his right on this land by long occupation thereof, and this right was transmitted to his descendants who continued to live on the land or use it & so confirmed the right & so these people lived on or used parts

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82 'The Maori Land Courts', p.29

83 Fenton, p.87

84 'Papers Relative to the Workings of the Native Land Court Acts' AJHR 1871 A-2A, p.14; 'Opinions of Various Authorities', pp.18-19; 'Native Land Laws Report', p.131; Judgment (Judge Ward), Kaiwhaiki Partition, 18/12/1897, Whanganui MB 36 pp.186-187; Judgment (Judge Ward), Waharangi, 24/1/1900, Whanganui MB 43 p.123; Judgment (Judge A. Mackay), Otaupuaroaro, 9/4/1890, Wairarapa MB 13 p.292

85 Smith Native Custom and Law, p.53

> of the block down to the present a period of 8 generations.... We think this was surely long enough to create & confirm a right to the land.[86]

This so-called 'three generation rule' also applied to absence from land, that is, a descendant of an earlier tribal member or holder of a personal right could not continue to claim an ancestral right after an absence of three generations or longer. Many claimants were rejected on these grounds.[87] In the mind of the Court this was firmly linked to the idea of *ahi kā*, or uninterrupted occupation, which also became a firm rule. Judge Mackay demonstrated the combination of the two concepts in the mind of the Court, with reference to women who married outside of the tribe:

> If she or her children return before the ashes become cold, it becomes again an *ahi-ka*, but there is a difference of opinion whether the grandchildren can recover their rights in that way, but there is no doubt that the great-grandchildren cannot do so unless they are expressly invited and welcomed by the tribe.[88]

While *take tupuna* and *take raupatu* were the preferred form for claims so far as the Court was concerned, it also accepted gifts or *take tuku* as a valid *take*. Gifts of land such as those made in return for military assistance and the like provided a good claim to title in the Court, especially if they were unopposed and reinforced over time as the element of ancestral occupation was added. Similar gifts, such as peace offerings made after hostilities had proved inconclusive, or compensation for the injured party in any wrongdoing, were also accepted by the Court.[89] The Court considered that arrangements by which outsiders came onto the land and used its resources granted a lesser right, without any underlying right to the land. Such a lesser right was indicated by the requirement for the beneficiaries to make a tribute of the choicest part of the produce to the leading persons of the land, who might cite their reception of such tributes as proof of their primary right to the land. Likewise, the use of the resources of any particular area by a group which was only sheltering there temporarily from an outside threat was not held to convey any title to the land.[90]

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[86] Judgment, Waharangi, 24/1/1900, Whanganui MB 43 p.123

[87] *e.g.* Judgment (A. Mackay), Tipua Mapunatea, 16/4/1890, Wairarapa MB 13 p.323; Judgment (Judge A. Mackay), Matiti, ibid. p.335

[88] Smith Native Custom and Law, p.58

[89] 'Opinions of Various Authorities', pp.19-20; 'Native Land Laws Report', p.131

[90] 'Opinions of Various Authorities', p.20; Judgment (Judge Heale), Mangaporau, 1/8/1877, Whanganui MB 1F p.272; Judgment (Judge Ward), Kaitangata, 7/6/1895, Whanganui MB 25 p.220

It was not disputed even after the wars that land was customarily 'owned' in the first instance by the tribe. Nevertheless, from 1873 onwards, Native Land Court judges were placed in the position of having to individualize land title by listing the names of every single person found interested on the certificate or grant. Individuals were then able to deal with their personal shares as they saw fit.[91] The requirements of the legislation meant that the Court's interest was increasingly directed towards the nature of individual rights to land and resources within customary tenure. The general consensus among judges seems to have been that any individual rights were limited to occupancy, cultivation, or exploitation of a resource by a family, or even an individual if other family members were dead or there was a special arrangement. These are all rights of usage rather than ownership in the Western sense. As Judge Monro expressed it, "The land was theirs in occupancy, and its produce was theirs in property; but neither the original occupant nor his family had any estate in fee in the land."[92] Monro, like many Native Land Court judges, used the language of English feudal tenure (estate in fee being equivalent to a freehold) to describe rights under customary Māori tenure. It was recognized, subject to the 1840 rule when it came to the granting of title, that such rights could be obtained by the unopposed use or appropriation of resources as well as by inheritance from an ancestor, who had presumably done the same.[93]

As well as applying Anglicized rules of customary law to Māori tenure, the Court applied Western concepts of linear boundaries. The Court used the Western model of separate surveyable blocks with defined owners, as the legislation required the Court to describe the boundaries of the block on the certificate of title (from 1873 the survey had to be undertaken before investigation began). Judges saw the country as being divided into a number of distinct tribal or iwi territories which were in turn divided into discrete hapū holdings.[94] This coloured their perceptions of traditional methods of establishing boundaries, especially in areas which were

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91 'Opinions of Various Authorities', p.18; 'Native Land Laws Report', p.131; Fenton, pp.9-10

92 'Workings of the Native Land Court Acts', p.14; 'Opinions of Various Authorities', p.20; 'Native Land Laws Report', p.131; Smith Native Custom and Law, pp.54-55

93 'Workings of the Native Land Court Acts', p.14; 'Opinions of Various Authorities', p.18; Judgment (Judge A. Mackay), Otaupuaroaro, 9/4/1890, Wairarapa MB 13 pp.291-292; Smith Native Custom and Law, pp.54-55

94 'Opinions of Various Authorities', p.18; see also The Native Land Act, 1873, s.21 which required the appointment of District Officers to compile maps showing the territories of each tribe and hapū as of 6 February 1840, to be accompanied by whakapapa showing the disposition of the land. This provision was never put into force, but shows the underlying thought of Pākehā officials.

not permanently occupied but which contained numerous valuable resources. Judge Mackay found that the lack of clearly demarcated boundaries at Otaupuaroaro presented difficulties when determining whose names should appear on the title deeds: "...the fact of there being no defined boundary has given rise to claims through the exercise of fishing rights that probably would not have occurred had the land not been interspersed with eel ponds."[95] The establishment of firm boundaries also forced Māori claimants to restrict their evidence to a strictly defined geographical area, when in fact their interests may have extended inseparably over areas deemed by the Court to be in another block.

Native Land Court judge Alexander Mackay presented a collection of Pākehā opinions on Māori tenure to Parliament in 1890, which contained the opinions of numerous Native Land Court judges as well as views from many earlier politicians, officials and missionaries. Mackay's summary represented the consensus view amongst the various writers quoted. He found that there were no fixed rules allowing full definition of tenure, because the law of force prevailed and there were regional variations; but he also found that there were a number of general principles which were recognized by the Native Land Court. "Native title" was "communal", with "tribal rights" being either ancestral or obtained through conquest or gift, although conquest without occupation did not confer a title. All occupation had to be based on a valid *take* to confer title to the land. Mackay found that chiefs held their position through both ancestry and as "elected head of the tribe", but that their rights over land were restricted to a role as "guardian" and "mouthpiece" for land rights. They could veto alienation, but had only an individual right to lands like the other people, and could not exercise "manorial or seigneurial rights" or alienate the land without the concurrence of the other owners. As regarding the rights of individuals, he wrote that they had a "right in common" over the general tribal lands, and an "individual right" to lands used by them for cultivation or hunting. To convert a right in common to an individual right, there had to be "some additional circumstance to support the pretension".[96]

When considering freshwater fishing rights in particular, rather than land tenure in general, judges tended to deal with the subject on a case by case basis rather than to declare any

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[95] Judgment, Otaupuaroaro, 9/4/1890, Wairarapa MB 13 p.291

[96] 'Opinions of Various Authorities on Native Tenure' AJHR 1890 G-1, pp.1-2

governing principles. There were only a very few cases in which fishing rights were the most important matter under consideration. There were two general ways in which fisheries were contemplated: either their exercise was seen as an 'act of ownership' on the block as a whole, along with the exercise of other types of resource rights; or fishing rights were seen as a lesser, separable right, capable of being exercised by a given group but not conferring on them any ownership of the land or waters.

The mention by judges of fishing rights as an act of ownership was particularly prevalent on lands where there was little or no permanent occupation to indicate ownership. In these cases resource exploitation was seen to confer ownership, for the purposes of the Court, in the absence of any 'greater' uses for the land.[97] This was enunciated in Alexander Mackay's Otaupuaroaro judgment, on the margins of Wairarapa Moana:

> Eels were then a favourite food with the Natives, and the use of the eel fishing places was considered a great test of Native ownership and even if the land was otherwise abandoned would be the means of maintaining the ownership. The undisputed use and exercise of the rights of fishing would be proof therefore that the mana of the land was with the tribe or hapu exercising this right...[98]

Mackay was appointed in 1891 to a commission to examine Māori rights to Wairarapa Moana, and again found that fishing rights were connected with the tribal group rather than individuals:

> ...it may here be observed that a New Zealand chief did not possess a sole right to the land, nor yet to eel-preserves or other food-producing places, which were even more common property if possible than land was amongst the hapu or tribe to which such possessions belonged.[99]

A number of examples of fishing rights exercised under sufferance, but not granting a right to land, were cited by judges in their decisions. Judge Gudgeon rejected Ngāti Maru's claim to lands near Piako, based in part on their exploitation of eel fisheries on the land in question, because they had used these fisheries as a result of their friendliness with the Ngāti Hako hapū which lived there.[100] Fisheries were specifically mentioned by Judge Maning as one of the resource rights which could be exercised by outsiders or "parties of strangers" who had been invited onto the land:

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97 Judgment (Judge Heale), Mangaporau, 1/8/1877, Whanganui MB 1F p.272; Smith, p.53

98 Judgment, Otaupuaroaro, 9/4/1890, Wairarapa MB 13 pp.291-292

99 'Claims of Natives to Wairarapa Lakes and Adjacent Lands — Report by Mr. Commissioner Mackay' AJHR 1891 G-4, p.10

100 Kopuraruwai/Koukourahi Judgment, p.14

> ...no rights of ownership were accorded to them. Persons in this position, when they took an unusually large quantity of fish ... were expected to make a present or donation to the principal owners of the land, and these donations have been sometimes brought forward in Court as secondary proofs of ownership by the persons who received them.[101]

The tendency to treat fishing rights as a form of "usufruct" rather than an ownership right was encouraged by the debate over fishing rights in the foreshore waters at Thames. These mudflats contained gold, which meant that their ownership was of national importance. The flats also contained an extremely important fishery, which led local Māori to take a case to the Native Land Court. While the soil below the high water mark belonged by default to the Crown under common law, foreshore land could be granted like other land. This was confirmed by the Public Reserves Act 1854, which had the purpose of handing the management of foreshore land to provincial governments; it allowed the government to grant lands below high water mark both to the provinces and to private individuals. A few grants were made to Māori for shellfish beds, and even in the late 1860s there was some feeling that land between high and low water mark might be subject to customary Māori title if the adjoining land had not been sold; but the goldfields debate led the Crown to more strongly assert its prerogative title to foreshore land.[102]

Chief Judge Fenton's Kauwaeranga judgment of 1870 awarded only an exclusive fishing right to the Māori claimants, not absolute freehold title, but he did suggest that had the issue not been of great political importance, he might have awarded full title to the tidal lands. He did find that there had been use of the grounds since ancient ancestral times, and that this use had been to the exclusion of other "tribes". He also found that "the use to which the Maoris appropriated this land was to them of the highest value", and that the mudflats were more important than any area of dry land.[103] The response of the government to this judgment was to suspend the right of the Native Land Court to deal with land below the high water mark in

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[101] 'Opinions of Various Authorities', p.20

[102] Mataitai, pp.55,68-70,116-117,127-129,144-145,153-159; Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) Wellington: The Waitangi Tribunal: 1988, pp.83-84; Waitangi Tribunal Finding of the Waitangi Tribunal on the Manukau Claim (Wai 8) Wellington: Government Printer, 1985, p.51

[103] A. Frame 'Kauwaeranga Judgment' Victoria University of Wellington Law Review 14 (1984): 227-245; 'Report of the Select Committee on the Thames Sea Beach Bill' AJHR 1869 F-7, p.7; Mataitai, pp.115-117,157. Fenton's Kaitorete Judgment of 1868, concerning the spit blocking Lake Ellesmere (Waihora) from the sea, made similar findings — Fenton, pp.31-42

Auckland Province in 1872, effectively preventing Māori from challenging its claimed prerogative, and it followed with the Harbours Act, 1878, which required special legislation to make a grant of foreshore land.[104]

Fenton's judgment and the government's insistence on prerogative right in the case of foreshore fisheries encouraged the Court to treat future Māori claims for fishing rights with diffidence, even in fresh water. In 1872, Iharaira Te Puke's claim to a fishing ground in Lake Taupō, or rather the portion of the lake bed under the water, was dismissed by Judge Rogan.[105] When the Crown appeared before the Native Land Court in 1881 asking to have the fishing interests in Wairarapa Moana granted to itself (after having negotiated the purchase of these fishing rights from some Wairarapa Māori), the Court adjourned the case pending further legal clarification. This adjournment was based on advice from the Crown Law Office which suggested that, "a right to fish was not an interest in land and therefore not within the jurisdiction of the Court."[106]

None of the judgments in areas where both land and water was being investigated allowed for fishing rights to be treated as equally important with land rights, as they were always seen as subordinate in some way to the general ownership of the surrounding area. Alexander Mackay found later on in his Otaupuaroaro judgment that despite the importance attached to eel fisheries and their usefulness as an indicator of land ownership, they could not confer the full rights derived from occupation as preferred by the Court:

> As regards the other places spoken of which fishing rights were said to have been exercised the Court considers that the kind of undefined rights obtained by roaming over the land and occasionally fishing in the lagoons and other does not operate to confer a permanent claim.[107]

The general opinion of the Court, that freshwater fishing rights were somehow inferior to physical occupation of the land, coloured most future judicial perspectives of Māori fishing rights until the late twentieth century.

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[104] New Zealand Gazette 1872, p.347; Mataitai, pp.70,157-163; Muriwhenua Fishing Report, pp.84-85

[105] Iharaira Te Puke, Kokoputaua, 29/3/1872, Taupō MB 1 p.225. No reason was given for the dismissal of this case, although it was amongst a number of unsurveyed blocks which were also dismissed at that time. Survey prior to investigation was not however a legal requirement in 1872.

[106] Assistant Law Officer, Wellington, to Native Land Purchase Office, 22/6/1881, NLP 81/244, Māori Affairs Department file MA 13/97, National Archives. See pages 198-200 *infra*.

[107] Judgment, Otaupuaroaro, 9/4/1890, Wairarapa MB 13 p.295

The general courts also considered the matter of Māori fishing rights when conflict between Māori and Pākehā resulted in civil or criminal cases. These cases considered Māori fishing rights largely along the lines of English law, and relied on the Native Land Court for interpretation of Māori tenure. One of the most important cases for the consideration of Māori rights in general was *Wi Parata* v *The Bishop of Wellington.* In this 1877 case Prendergast, the Chief Justice of the Supreme Court, applied the new principles of legal positivism to Māori rights. Legal positivism, or the act of state doctrine, was almost the antithesis of the doctrine of aboriginal title; and while its emphasis on the supremacy of parliament and statute law was not universally accepted in the United Kingdom it took firm hold in the New Zealand legal system. It held that the Māori cession of sovereignty in the Treaty of Waitangi was a nullity, because Māori did not have the political capability to enter into such a transaction. More importantly for the consideration of resource rights, this case ruled that any dealings between the Crown and Māori for Māori lands were 'acts of State' and not reviewable by the courts. The only cognizable Māori rights were those protected by statute or common law (although cases from other common law jurisdictions do not appear to have been acceptable). This removed aboriginal title claims from the purview of the New Zealand courts until the 1980s, when new legal research from Paul McHugh and other scholars, combined with the more receptive political and legal climate, saw the doctrine of aboriginal title accepted back into the courts.[108]

Successive pieces of fishing legislation in the latter half of the nineteenth century usually contained some provision purporting to recognize Māori fishing rights, often expressed as Treaty rights. Some Māori prosecuted for breaches of these Fisheries Acts sought to use these clauses to claim immunity from prosecution, but the courts usually cited the non-enforceability of the Treaty and rejected these cases. This slim hope for recognition of Māori rights was cut off completely in 1914 in the *Waipapakura* v *Hempton* case. A Māori woman was convicted for illegal whitebaiting in the Waitōtara River but sought to have this overturned on the grounds that she was exercising a Māori fishing right under section 77(2) of the 1908 Fisheries Act. Chief Justice Stout rejected the case because no legislation enshrining Treaty rights had been passed,

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[108] *Nireaha Tamaki* v *Baker* [1894] 12 NZLR 483; Frederika Hackshaw 'Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi' in I.H. Kawharu (ed.) Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi Auckland: Oxford University Press, 1989, pp.99-102; Mataitai, pp.119-123; Paul McHugh The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi Auckland: Oxford University Press, 1991, pp.376,379-382; Waitangi Tribunal The Ngai Tahu Sea Fisheries Report 1992 (Wai 27) Wellington: Brooker and Friend, 1992, pp.157-158. See pages 28-29,65 *supra*.

and cited *Wi Parata* and other similar cases as authorities. He also ruled that the Native Land Court had jurisdiction over land alone, and not customary rights. This formula was followed by all other fisheries cases until *Te Weehi* in 1986.[109]

The positivist approach, introduced to the New Zealand courts in the late 1870s by Prendergast and his brethren judges, was applied to all cases regarding Māori claims to waters as well as fisheries for most of the twentieth century. As the positivists held that Māori rights were only cognizable by the courts so far as they were enshrined in legislation or the common law, all the water ownership cases were fought on points of statute and common law, not Māori custom. One of the most notable examples of this was the series of cases regarding the ownership of the bed of the Whanganui River. This began in the Native Land Court in 1938 and then passed to the Native Appellate Court in 1944, the Supreme Court and a Royal Commission of Enquiry in 1950, and finally the Court of Appeal in 1955 and 1962. In the general courts, the argument revolved entirely around questions of English law, most particularly the principle of *ad medium filum aquae*. This rule held that when land on the bank of a river was sold, the adjoining river bed was also conveyed, up to the middle line of the river. On this point and others, the assertion of the Crown that the bed of the Whanganui River was not customary Māori land was upheld.[110] While questions of customary ownership were debated, they did not influence the outcome of this and other similar cases, as they had not done in the late nineteenth century.

Nineteenth century Māori statements on tenure in the Pākehā domain

Māori commentators seem to have made surprisingly little direct contribution to the large body of Pākehā nineteenth century writings dealing with Māori tenure, although many of the commentators already cited stated that they drew much of their material from knowledgeable (but unnamed) Māori informants. Māori were often asked to comment only on the issues which interested Pākehā politicians, such as the debate over the individual versus the collective right to

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[109] [1914] 33 NZLR 1065; Mataitai, pp.127-129; Muriwhenua Fishing Report, pp.85-88,96-99; Ngai Tahu Sea Fisheries Report, pp.159-160,212

[110] *The King* v *Morison* [1950] NZLR 247; *In re the Bed of the Wanganui River* [1955] NZLR 419; *In re the Bed of the Wanganui River* [1962] NZLR 600. See also pages 350-352 *infra*; *Re the Ninety Mile Beach* [1960] NZLR 673; *Re the Ninety Mile Beach* [1963] NZLR 461; Mataitai, pp.74-79.

alienate land to Pākehā, rather than to present interpretations of Māori tenure from their own standpoint. Pākehā also defined the method of contribution — the printed material contains mostly information drawn from sources such as letters from selected chiefs solicited in response to direct enquiries on particular topics, or carefully chosen excerpts from Pākehā-sponsored events such as the Kohimārama conference of 1860. Most of those Māori quoted by various Pākehā authorities were drawn from the sectors of Māori society most involved in Pākehā government and settlement, and so the many dissenting voices, including those of Kīngitanga and Hauhau, are poorly represented among the material published in English.

This paucity of direct evidence from even those Māori sympathetic to settlement may well be a reflection of the increasing alienation of Māori from the political mainstream as settler government and concerns replaced the colonial administration, and as a result of the hardening of Pākehā attitudes resulting from war in the 1860s and 1870s. From 1865 onwards, the bulk of the debate concerning Māori tenure was diverted away from the general political arena to the Native Land Court. Here Māori gave a wealth of evidence concerning the land and waters, but most of this information was not readily accessible to those not directly involved in the Court process. Māori perspectives only became part of the received Pākehā version of land tenure and fishing rights after reinterpretation by Pākehā judges. The Māori voice had become effectively marginalized from the Pākehā political mainstream. Even when Māori began contributing material to the Journal of the Polynesian Society towards the end of the century, 'reliable' contributors were chosen and their contributions too were selected, edited and translated by Pākehā 'experts'.[111]

The rights of the chiefs were seen by most Māori commentators to be restricted to a protective and administrative role, strongly linked to the personal qualities of the particular chief. The Ngāti Whātua chief Paora [?Tuhaere] told the Kohimārama conference in 1860, "You speak of *mana*. What is the *mana*? Where is the *mana*? There is no such thing as putting *mana* on the land."[112] A group of ten experienced Native Land Court assessors wrote a piece on mana for the edification of Native Land Court judges in the late 1880s, and expressed the opinion that there were different degrees of chieftainship. There were superior chiefs who had "great *mana* over the

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[111] M.P.K. Sorrenson Manifest Duty: The Polynesian Society over 100 years Auckland: The Polynesian Society, 1992, pp.32-39; see page 32 *supra*.

[112] 'Further Papers Relative to the Native Insurrection', p.23

other chiefs and tribes within the boundaries of the district", but this mana extended only to the people and not their lands. Below these superior chiefs were the hapū chiefs, who, "have a form of *mana* that is over their own *hapu*, but that *mana* does not confer (on him) the right to take the land of such *hapu* for himself.... A chief would not have a right to the land through *mana* alone."[113] Others also affirmed that mana was effective over people rather than over land.

Instances were given of the actual ways in which the mana or authority of chiefs was acknowledged by others. Wīremu Te Wheoro, a Waikato chief with considerable experience in both Māori and Pākehā power structures, told in an 1870 letter to government commissioner Colonel Haultain of chiefs "who had too much land for [their] own occupation" putting subordinates to work on these lands.[114] Likewise, in an early article for the Journal of the Polynesian Society, Society member [Hoani Paraone] Tunuiarangi of Wairarapa told of a custom dating back at least to the days of Te Akitu-o-te-rangi (*fl. c.* 1575), by which he and later chiefs of "considerable power and influence" called upon people from neighbouring hapū to work his or even their own forests and fisheries, and present him with the produce. However, "nothing in this ... implied any sense of subserviency in those who supplied the products;... they did not hold the position of *rahi* or serfs".[115]

Pango-te-whare-auahi, a kaumātua of Te Arawa and another early Polynesian Society contributor, told of the powers of the Ngāti Kahungunu ancestor Tupurupuru:

> ...ko ia [Tupurupuru] te tino rangatira o Turanga — ko ia anake, kaore tetehi atu i runga i a ia, ko ia te tino rangatira mana nui rawa. Ina hoki: Ki te poua tona tokotoko i runga i tetehi taumata, ka haere nga mano katoa o Turanga ki te whiu i te kai ki te tokotoko ra. Ki te waiho tona tatua i runga i tetehi taumata, ka haere katoa nga mano tangata o Turanga ki te whiu i te kai ki te tatua...
> Tu-purupuru ... was the principal chief of Poverty Bay, he alone; there was none above him, and he was the chief of the greatest *mǎna*. For instance: If he struck his staff into any hill (or place) all the thousands of Turanga would bring there all kinds of food for him. If he left his belt in any place, the people would also deposit all kinds of food there.

Tupurupuru later killed his young twin *tuākana* (cousins of a senior branch) out of fear that their mana would exceed his, and "the power, guidance and government of all Turanga ... together

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[113] 'Opinions of Various Authorities', p.16

[114] 'Workings of the Native Land Court Acts', p.28

[115] Major Tu-nui-o-Rangi 'Kakahi-Makatea Pa, Lower Wairarapa' JPS 13 (1904): 126-129, p.126

with influence over the land and the people" would pass to them.[116]

There was seen to be a great deal of variety in the ways title to the land could be derived. Wī Te Wheoro declared in 1870, "Titles to land are derived through many things — through wars sometimes, and sometimes through women."[117] This appears to be a paraphrase of a well-known *whakatauākī*, "He wahine, he whenua, ka ngaro te tangata" (for women, for land, men are lost). The Native Land Court assessors said later, in the late 1880s, that chiefs had a claim to their own part of the tribal land "through ancestry, conquest, gift, or occupation from the time of his ancestors down to himself..."[118] This is much closer to the structured hierarchy of rights developed by the Native Land Court judges with whom these assessors worked to determine title.

Given the political concerns of the 1850s and 1860s, the relative place of tribal and individual rights were discussed by many Māori. Seven of the nine Māori who gave evidence to the Native Affairs Board in 1856 disagreed that Māori had "a strictly individual right to any particular portion of land, independent and clear of the tribal right over it", but it was generally acknowledged that individuals could have some kinds of rights over parts of the tribal estate. Hēmi Taka was one of the aforementioned seven, but appended to his answer was, "Says he is an individual owner, but would have to make presents if he sold."[119] While this clearly refers to alienation rights, it is still an indication that others were seen to have some sort of interest in what was done with personal holdings.

The place of individual title was the key issue at Waitara. Wīremu Kīngi wrote to Octavius Hadfield in December 1859, after the disputed purchase had been made but before the outbreak of war:

> ...e ki ana ratou no Te Teira anake tona pihi whenua. Kaore, no matou katoa, no te tamaiti pani no te wahine pouaru taua pihi whenua.

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[116] Pango-te-whare-auahi 'Te Hekenga a Kahu-nunu [sic]' translated by S. Percy Smith as 'The Migration of Kahu-nunu' JPS 14 (1905): 67-95, pp.75,90-91

[117] 'Workings of the Native Land Court Acts', p.28

[118] 'Opinions of Various Authorities', p.16

[119] 'Report of a Board ... upon the State of Native Affairs', Appendix p.1

> They say that Teira's piece of land belongs to him alone. No, that piece of land belongs to us all, it belongs to the orphan, it belongs to the widow.[120]

The Rev. Rīwai Te Ahu, also of Te Āti Awa, complained that personal interests at Waitara were so jumbled together that it was impossible to separate the land of those who wished to sell from the land of those who did not. He did not dispute that Te Teira had some personal title at Waitara, but said that this was limited to the land he used:

> Ki ana mara ano tona ekenga i roto i taua whenua, e rua taupa, e toru he penei tahi ano hoki te tika o matou ko era kua pana atu ra i runga i taua whenua, e rua taupa, kotahi, e toru, e wha, a tena tangata, a tena tangata, i roto i taua whenua.
> He [Te Teira] has a title, that is to say, to his own cultivations within that block — two or three subdivisions. So also have we a title, as well as those who were driven off that block of land, each man having two subdivisions, or one, or three, or four, within the block.

These personal rights to resource areas, once appropriated or otherwise brought into use, were held to be transmitted down the generations. Rīwai Te Ahu also wrote in this letter of the boundaries separating the various cultivations at Waitara having been marked out by their ancestors, suggesting that these cultivations had continued to pass down the various descent groups.[121]

The failure of successive Pākehā governments to give any legal credence to tribal title continued to be a source of frustration to Māori throughout the nineteenth century. The Federated Maori Assembly of New Zealand petitioned Parliament in 1893 with the complaint (amongst others) that, "This practice of empowering a single person to do whatever he pleases with tribal lands has been a complete innovation to us, because lands never belonged to one person but to the whole tribe or family."[122]

The opinions of the various Māori quoted in official papers on the place of conquest in tenure are less than unanimous, reflecting the different experiences of different tribes in the turbulent years of the early and mid-nineteenth century. Tamihana Te Rauparaha, son of the great Ngāti Toa warrior and conqueror, was quite straightforward in his comments at Kohimārama in 1860:

> We know very well that according to our customs, might is right. Our maori [sic] plan is seizure.... Kapiti, for instance, was taken. The chieftainship of that belongs

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[120] 'Further Papers Relative to the Native Insurrection', pp.8,34

[121] 'Further Papers Relative to the Taranaki Question', pp.10,36

[122] 'Petition of the Federated Maori Assembly of New Zealand' AJHR 1893 J-1, p.2

> to me. According to maori custom, when a man prevails in a struggle he claims it (the land).[123]

Yet Tamihana's great emphasis on his father's conquest was influenced by the arrival of Pākehā law, and the need to demonstrate a *take* acceptable in the eyes of Pākehā officials. There had not been sufficient time for Ngāti Toa to establish a two-pronged title through intermarriage, so he had to stress the strength of his *take raupatu*.[124] Te Wheoro of Waikato was more circumspect:

> Should one side be beaten, the land is taken; should the conquerors be willing to leave some of the conquered on the land, they may live there, but without *mana*, and without any right to the land...
> There are cases also in which the land has been fought for but not taken possession of; the original owners remain, because the place from which their enemies came was far distant.[125]

Where fisheries were mentioned at all, it was as part of the general discussion of land tenure and related issues, reflecting once again the dominance of the Pākehā agenda. Waters and fisheries were not seen by Māori as in any way different or separable from the land and its resources. When Hoani Paraone Tunuiarangi was cross-examined by Mackay about the district around Wairarapa Moana during Mackay's commission of enquiry into the Wairarapa Moana area, Tunuiarangi discussed the "interests" and "rights" of both (chiefly) individuals and tribes to both the lake and to the land around it.[126] Likewise, when Wīremu Tamehana Tarapipipi Te Waharoa and Tunuiarangi wrote about the gathering of produce from the land by either *rahi* (serfs) or people paying a tribute to a powerful chief, fish and eels were mentioned only alongside birds and cultivated food.[127]

The story of Māori views of their own traditional rights with regards to freshwater fisheries is one of marginalization. Throughout the nineteenth century the focus of Māori-Pākehā dealings was fixed firmly on land, specifically farmland, which had prime economic significance for the Pākehā settlers. Freshwater and even marine fisheries were of minuscule importance and

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[123] 'Further Papers Relative to the Native Insurrection', Appendix D p.45

[124] See pages 60,71-72,78 *supra*.

[125] 'Workings of the Native Land Court Acts', p.28

[126] 'Wairarapa Commission Report', pp.28-29

[127] Shortland Maori Religion, p.95; Tu-nui-a-Rangi, p.126

value compared to this. More generally, as settler numbers increased and the machinery of Pākehā government extended its control over Māori, they were increasingly kept out of mainstream Pākehā discourse, even where matters directly relevant to Māori were at stake. It is not surprising that under these circumstances freshwater fisheries were relegated to a minor place in the discussion.

CHAPTER THREE

Māori and the Native Land Court

"The work of a Lands Court is to ... insure to a European purchaser a title with quiet possession. The political importance of this cannot be over-estimated."[1]

The minutes of the Native Land Court, especially the records of nineteenth century hearings, provide a vast amount of detail concerning the relationships between Māori and their land and resources. It is therefore important to understand the history of the Court and the underlying political and social forces which shaped it, given its influence on perceptions of Māori tenure, both then and now. The previous chapter examined the intellectual background to the Court, its conceptions of the nature of customary Māori tenure, and the place of those conceptions within general nineteenth century Pākehā thought on Māori tenure and fishing rights. This chapter will turn to the actual workings of the Court — its governing legislation, its practices and its rules, and the effect that these had upon the ways in which Māori expressed their customary rights to lands and fisheries to the Court. As the case studies of fishing rights in the second part of this thesis are based largely on Native Land Court evidence, an understanding of these processes and influences is necessary to put the fisheries evidence into context.

Established on a nationwide basis in 1865, by *circa* 1900 the Court had dealt with almost all customary Māori land, excluding those lands which had already been sold to the Crown and settlers or confiscated prior to 1865. Therefore the Court was of limited importance in some parts of the country, including almost all of the South Island, because virtually all the land there was owned by the Crown or individual Pākehā by 1865. In other areas, such as the upper Whanganui river valley, almost all the land passed through the Court because of its inaccessibility to Pākehā before 1865.[2]

The Court was, in the first instance, a Pākehā forum, established primarily to remedy government problems rather than to benefit Māori. The Court was to determine the ownership of

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1 'Memorandum on the Operation of the Native Lands Court, by Dr. Edward Shortland' AJHR 1871 A-2, p.5

2 The title to the Tauakira block, situated in rugged country to the east of the river, was not investigated until the 1920s.

the land according to Māori custom,[3] but a number of factors impinged upon its ability to carry out that task. It was constrained by the terms of the enabling legislation, which determined the circumstances under which the claims could be heard, and established who could be granted title. Most importantly, legislative changes put an increasing emphasis on individual title, in contrast to the customary communal approach to Māori landholding; and the degree of emphasis on individual rights in any given piece of Land Court legislation influenced the degree to which Māori discussed individual rights in the Court.

In addition to the restraints imposed by the legislation, the evidence put forward by Māori in pursuance of their claims in the Court was influenced by the procedures followed for an investigation of title. These court procedures were determined by the provisions of the legislation in force at the time, the rules of the Court itself, and the propensities of individual judges. They drew heavily upon English juridical practices and courtroom conventions. Māori evidence was shaped by the need to conduct cases in conformity with the judges' conceptions of customary tenure and rights, this being the manner most likely to meet with judicial approval.

Despite the reordering imposed by Court procedure, the evidence given by Māori to the Native Land Court embodies a vast and invaluable corpus of information relating to customary rights and tribal history. Much of this might have otherwise been lost to Māori, given the great social dislocation of the period. The Court itself was an oral forum, where points of contention were debated and refuted by rival parties. They drew upon their own comprehensive stores of oral tradition, passed down the generations. This information was then transformed from the spoken Māori of the witnesses to the written English of the minute books, through the medium of interpreters and clerks of varying skills and sympathies. This demands a close examination of the nature of the evidence, given the potential for distortion that arises from the multiple transitions and interpretations undergone by much of the Land Court evidence.

The Pākehā framework — the Native Land Court machinery

The passage of Māori land into Pākehā hands in the nineteenth century had been troubled for as long as Europeans had sought to settle permanently in New Zealand, as at first

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[3] Native Lands Act, 1865, Preamble

neither side properly understood what the other intended when it came to land transactions. Before the signing of the Treaty of Waitangi, both land speculators and the New Zealand Company purportedly bought large tracts of land from Māori without ensuring that Māori fully comprehended the details and consequences of the compact. William Hobson, the Crown's representative, included the usual British colonial policy of pre-emption in the second article of the Treaty of Waitangi. Pre-emption and a refusal by the Crown to automatically ratify pre-Treaty purchases also served to curb the activities of land speculators, many of whom were laying claim to large areas of the country. Their activities were seen to threaten the orderly settlement of the colony.[4] Some writers, such as Peter Adams, have argued that the Crown's policy of pre-emption was motivated less by a sense of fiduciary duty and more by a desire to profit through a monopoly in land dealings; while others such as Paul McHugh have seen pre-emption more as a result of the humanitarian principles held by most key British officials at the time the Treaty was signed.[5] In the years immediately following 1840 all pre-Treaty land transactions were investigated by land commissioners, and many claims were invalidated or greatly reduced in size.

Nevertheless it was the Crown's conflicting roles as protector of the Māori under the Treaty of Waitangi on the one hand, and purchasers of Māori lands on the other, that led in part to the disintegration of Māori-Pākehā relations in the 1860s. The war at Waitara in 1860 had been provoked in the first instance by the failure of the Crown to ascertain properly the ownership of Māori land before undertaking the purchase of the land. Therefore, it was decided that the title of Māori land ought to be determined by some judicial body before the land was put up for sale to Pākehā, be they the government or settlers — the Court waived its right of pre-emption when it created the Native Land Court but continued to purchase Māori land.[6]

The first piece of legislation passed with this objective in mind was the Native Lands Act 1862. This signalled a flood of statutes over the next forty or so years, an indication of the difficulty of reconciling English tenure concepts with the communal, ancestral nature of Māori

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4 Paul McHugh The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi Auckland: Oxford University Press, 1991, pp.78-80,101-102,321; Claudia Orange The Treaty of Waitangi Wellington: Allen & Unwin, 1987, pp.27,33-34

5 Peter Adams Fatal Necessity Auckland: Auckland University Press/Oxford University Press, 1977, pp.14,192-209; McHugh The Māori Magna Carta, pp.78,102

6 See pages 73-74 *supra*.

land. The sheer volume of law-making also served to drive jurists and Māori alike to distraction. Thomas Mackay gave a synopsis of Māori land laws in 1891 which referred to 16 Acts then in force, not to mention another 25 which had already been repealed; the 1909 Native Land Act consolidated and amended no less than 69 statutes or parts of statutes.[7] In two years alone (1888-89) there were seventeen statutes passed dealing with Māori lands and land courts. Acts were no sooner passed than Bills came before the House seeking to amend or repeal them, and on top of the numerous Acts, there were a number of Bills introduced which were never passed.[8] This meant that the application of the law was sometimes haphazard, and many important provisions and safeguards were never implemented.

The intention of the 1862 legislation was made clear in the Preamble:

> And whereas it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such land when so ascertained defined and declared were assimilated as nearly as possible to the ownership of land according to British law ...

In short, title to Māori land was to be cast in the forms of English law to expedite alienation. The Crown also waived by this Act its right of pre-emption and the associated fiduciary role assumed under the Treaty, opening the way for settlers and speculators also to deal directly with Māori.[9] The 1862 Act, which envisaged district tribunals of important chiefs chaired by Pākehā magistrates to arbitrate cases, was only put into effect on a very limited scale. The first Chief Judge of the Native Land Court, F.D. Fenton, also quickly removed the intended regional focus of the legislation by cancelling the separate districts and putting the whole of New Zealand under the jurisdiction of one roving court.[10] However, the principle of facilitating alienation remained the same when the Native Land Court was actually brought into widespread operation by the Native Lands Act 1865.

The Native Land Court, as constituted by the 1865 Act, was a Court of Record charged with investigating title to Māori land held under customary usage, and converting this title to one

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7 'Unfinished Report by the Late Mr. Thomas Mackay Relating to the Native-Land Laws' [Mackay Report] AJHR 1891 G-1A, p.18; 'The Maori Land Courts: Report of the Royal Commission of Inquiry' AJHR 1980 H-3, p.12

8 E.J. Haughey 'The Maori Land Court' New Zealand Law Journal (1976): 203-210, p.207

9 McHugh The Māori Magna Carta, pp.102-103

10 Alan Ward A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand Auckland: Auckland University Press, 1973, pp.151-152,180-182

derived from the Crown. It was also to "provide for the regulation of the descent of such lands".[11] There was to be a Chief Judge and a number of other judges, appointed as necessary, travelling throughout the country to hear cases. Initially there were five other judges in addition to Fenton.[12] Assisting the judge to hear cases would be a Māori Assessor or Assessors, generally chiefs unconnected with the case under investigation, who could be appointed and discharged by the Governor at will. Judgments required the concurrence of both judge and assessors, but in practice the role of the assessor was usually limited to advising judges, and occasionally cross-examining witnesses.[13] Court hearings were held in various districts once enough applications for investigation of title had been received to justify a Court session.[14]

When an investigation reached the Court, there was an established format for hearings, which was much like that observed in other court jurisdictions. The claimant (the individual or group who had applied to have the title to a block investigated) first had to convince the Court that he or she had a prima facie case. This being done, any counter-claimants would then present their cases, and be cross-examined on their evidence by the claimants and any other counter-claimants, and sometimes also the judge and assessors. The claimants would then present their case, and be cross-examined in turn. The presentation of cases was followed by the summarizing addresses of the counter-claimants and claimants to the Court, which would then retire to consider its judgment.[15] Lists of owners would be submitted by the successful parties, and these lists might then be challenged and further evidence given to establish the legitimacy of individual names on the list, and to determine relative interests if required by the legislation, before a certificate was issued for the land.

The case for each party would be managed by a conductor, either one of the party with some experience of Land Court hearings, a similarly experienced member of the wider hapū or

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[11] Native Lands Act, 1865, Preamble and section 5. This provision concerning the descent of lands had huge significance for the future management of Māori land, as all the descendants of the original grantees inherited a share of their lands. This rapidly fragmented title to blocks amongst hundreds or even thousands of owners, making individual shares uneconomic and development of the land difficult.

[12] They were John Rogan, Henry Monro, Frederick Maning, T.H. Smith and William White. New Zealand Gazette 1865, pp.325,342

[13] Ward A Show of Justice, p.186

[14] 'Rules under "The Native Lands Act, 1865" ', New Zealand Gazette 1867, p.135

[15] ibid. p.136

iwi group, or a Pākehā lawyer or agent. In pursuing their case, the conductors would call various witnesses to present evidence of the group's rights to the land in question. Individuals also sometimes brought claims (or, more often, stood as counter-claimants) on their own behalf or as representative of themselves and their dependants. Witnesses would give evidence as to their whakapapa or descent, the occupation of the block, its history, its resources, and the use of these resources. It was important to each case that the evidence given was as comprehensive as possible, because only the evidence presented to the Court was regarded as admissible — judges or assessors could not act upon any personal knowledge they possessed, even if they knew the particulars of the case as given to the Court were not fully accurate, or that some of the rightful owners of the land were not represented.[16]

The 1865 Act retained the intentions of the 1862 Act, and was equally explicit about its intention to "extinguish" the principles of customary Māori land-holding. The owners under Māori custom were to be ascertained, then customary title would be converted to Crown-derived title. This was represented by a certificate of title which was capable of being exchanged for a Crown Grant upon purchase by Pākehā.[17] The Government's desire to reshape Māori tenure along English lines required the conversion of the customary tribal or hapū title to land to ownership vested in a number of individuals without any legal corporate structure. Section 23 of the Act provided that certificates could be issued to up to ten individuals, or to a tribe where the block was larger than 5000 acres. In practice, only two or three blocks were issued to a tribe by name.[18]

Despite this provision in the legislation for the recognition of tribal title over large areas, Fenton took the duty of individualization of title seriously. Certificates for both large and small blocks were issued to a handful of individuals, usually chiefs.[19] These grantees were widely

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[16] Ward A Show of Justice, pp.212-213

[17] Under the 1873 Act, a freehold title could be issued to Māori on application if there were fewer than ten owners of the block in question; from 1886 all certificates of title were deemed to be Crown Grants.

[18] 'Memorandum on the Native Land Laws, by Mr W.L. Rees' AJHR 1884 G-2, p.1; 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws' [Native Land Laws Report] AJHR 1891 G-1, p.vii; 'The Maori Land Courts', p.11

[19] Ward A Show of Justice, p.213; Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim (Wai 9) Wellington: Waitangi Tribunal, 1987, pp.32-34

believed to be trustees for the land (judges often telling Māori in their Court that this was so),[20] but in fact they had unrestricted rights to deal with the land as they chose. Many chose to sell, especially those under financial pressure as Māori debt levels grew after years of war and participation in the increasingly Pākehā dominated cash economy. Many chiefs, described by Te Kooti as "the money rangatira", had gotten into severe financial difficulty through living in extravagant style well beyond their dwindling means, encouraged by excessive credit offered by calculating Pākehā shopkeepers. Land was often their last available realizable asset.[21]

The problem of dispossession was compounded by the fact that any individual could bring a claim before the Court, even if an investigation of title was against the interests of all the other owners. Once the land was before the Court, even those with a cast-iron right to the land could be dispossessed if they did not appear and argue their case and pay their share of the costs. It was often not difficult to find individuals willing to bring a case in order to secure the Court's recognition of their claim. Many who did so had the financial backing of Pākehā who wished to get a foothold on the land by forcing the owners to incur debts, thus encouraging them to sell part of the land, or mortgage it (then risking foreclosure), to repay the money. Even the act of attending court had a great financial cost for many, who had to travel to and stay in the towns where the cases were heard, often at some considerable distance from their homes and for several months at a time.[22]

The Chief Judge, Fenton, believed that the consequential disinheritance of the vast majority of Māori was in fact in their best interests, as it would encourage the establishment of a moneyed chiefly class. The landless majority would then be forced into the Pākehā cash economy where they could partake of the benefits of Western civilization, while the 'waste lands' sold by the chiefs would be open for Pākehā settlement. His stated solution to Māori dissatisfaction with a few individuals being made owners of large blocks was to subdivide the blocks further, rather

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[20] 'Native Land Laws Report', p.vii

[21] Angela Ballara 'The Pursuit of Mana? A re-evaluation of the process of land alienation by Maoris, 1840-1890' JPS 91 (1982): 521-541, pp.524-526,531-536; Orakei Report, p.42; Ward A Show of Justice, p.213

[22] 'Memorandum on the Operation of the Native Lands Courts, by Sir William Martin' AJHR 1871 A-2, p.4; The Hon. Colonel Haultain to the Hon. D. McLean, 18/7/1871, in 'Papers Relative to the Workings of the Native Land Court Acts' AJHR 1871 A-2A, p.4; Wi Te Wheoro to Col. Haultain, 23/5/1870, ibid. p.28; Wiremu Hikairo ibid. p.31; 'The Maori Land Courts', p.11; Orange, p.179; Ward A Show of Justice, pp.186,253. A.G. Bagnall reported that in Wairarapa, Greytown retailers did so much business when the Native Land Court sat that they hosted 350 Māori to lunch and a brass band concert in 1885 — A.G. Bagnall Wairarapa: An Historical Excursion Masterton: Hedley's Bookshop for the Masterton Trust Lands Trust, 1976, pp.230-231.

than to allow more owners.[23] This approach was despite his frequent rejection of the concept of an individual title in customary Māori land tenure. He expressed this bluntly in his 1868 Kaitorete judgment: "The Court cannot recognise individual ownership of native land."[24]

Fenton was not alone among Native Land Court judges in seeking to facilitate the passage of Māori land to Pākehā settlers. Judge Monro agreed:

> I would desire to remark that, so far from being averse to seeing large tracts of land alienated from their aboriginal occupations and passing into the hands of European colonists, I have always looked upon the wide extent of the uncultivated holdings of the Maori as a curse to them rather than a blessing; and I maintain that every legitimate encouragement should be held out to them to part with their surplus lands to those who can make use of them for which they were intended, care being taken that each Native has ample land secured to him for his own maintenance.[25]

However, not all in the legal profession were so keen to see Māori stripped of their land in this manner. Sir William Martin, a former Chief Justice and noted humanitarian, had decided as early as 1871 that, while he was not opposed to facilitating settlement, the way in which the Native Land Court had been interpreting the law was creating valid grievances among Māori and damaging race relations:

> [T]he Court itself has come to be regarded by many of the most intelligent Natives with strong suspicion and dislike.... If we allow these men to be alienated, we shall have small chance of winning over the Native people at large to an acceptance of our law.[26]

The injustice of the ten owner system was recognized and rectified by the Native Land Act 1867, although a retroactive remedy for the land already passed through the Court did not come until 1886. On proposing the Bill the Minister in charge of the Native Department, J.C. Richmond, spoke of the desirability of restricting the alienation of land, and acknowledged the "evil" that had resulted when nominal trustees had sold under financial pressure. The

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[23] Judge Fenton to the Hon. D. McLean, 28/8/1871 in 'Papers Relative to the Workings of the Native Land Court Acts', p.11; Evidence of F.D. Fenton, 'Native Land Laws Report', p.47; Ward A Show of Justice, pp.216,254

[24] Kaitorete is the spit barring Lake Ellesmere from the sea. Fenton's rejection of individual title in this case was based partly on the outbreak of war at Waitara which had followed government attempts to purchase land from individuals against the will of the tribe. [Chief Judge F.D. Fenton] Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879 [Auckland: Native Land Court], 1879, p.41; 'Native Land Laws Report', p.viii

[25] Judge Monro, Auckland, to Chief Judge Native Land Court, 12/5/1871 in 'Papers Relative to the Workings of the Native Land Court Acts', p.14

[26] 'Martin Memorandum', p.3

Government's motives were not entirely altruistic, as can be seen from Richmond's admission to the House that the Government had had to "sustain the irritation and discontent" of those who had been dispossessed under the 1865 Act.[27] The certificates of title issued under section 17 of the 1867 Act were still to bear only ten names on the front, but all other people found to be owners (whether they put in a claim or not) would be registered in the Court records, and the certificate was to carry some endorsement indicating this. The ten named still retained powers to lease out the land for up to 21 years, although they could no longer sell or mortgage it unless it was subdivided first, which required the assent of a majority of owners. The problems of cost remained, as any individual could still put forward a claim, and on top of ordinary hearing costs, section 33 of the Act also allowed for survey costs to be charged against the land by a claimant, to be paid by the grantee regardless of whether they had sought to have the title investigated.

The trustee status of the ten named owners remained uncertain. Large blocks of land were no longer sold out from under the feet of the occupiers, but much was leased out for the maximum 21 years at very low rents, which went only to those named on the certificate unless they chose to share the proceeds.[28] Even after this change was made in the law, Chief Judge Fenton regarded section 17 of the 1867 Act as purely discretionary. He continued to grant lands to ten or fewer absolute owners as per the 1865 Act, not even telling Māori of the existence of section 17. Thus he did not list the names of all those interested, frustrating the legislature's efforts to curb the excesses of land alienation under the 1865 Act.[29] Individualization of title still remained a priority for both the Court and the law makers. An 1869 Amendment Act declared that the interests of every owner were not to be regarded as equal unless specifically stated, with the Court to determine the relative interest or share of each owner. This legislation also required that decisions concerning the sale, subdivision etc. of the land were to be made by a majority in value of owners, not a majority in numbers. This was an important development in the process of completely converting Māori landholding to Pākehā tenure and economic patterns.

The entire Native Land Court apparatus was coming under increasing attack by its opponents by this time, and the need for completely new legislation addressing the all-too-

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27. NZPD 1 (1867), pp.1135-1136

28 'Martin Memorandum', p.3; 'Rees Memorandum', p.2; 'Native Land Laws Report', p.vii; 'Mackay Report', p.10

29 Ward A Show of Justice, p.216; Orakei Report, pp.32-35,153-154

apparent problems of the old was recognized. Sir William Martin and Dr. Edward Shortland, a former Sub-protector of Aborigines and Native Secretary, wrote memoranda on the problems of the system in 1871. These were supported with evidence from a number of people (both Māori and Pākehā) directly involved in the Court process.[30] Many of the grievances raised by Martin and Shortland have already been discussed, but one other which all were agreed on was the failure of the government to translate the laws into Māori, let alone colloquial Māori comprehensible to all.[31] Thus not only were Māori at the mercy of the legal interpretations of the Native Land Court judges when it came to dealing with their lands, but they had little way of remedying the situation, as few laypeople would have been able to understand the finer points of these convoluted and technical laws in their own language, let alone a foreign one. Many claimants then sought an advantage by using Pākehā agents and lawyers to represent their claims in the Court. This development was regarded by many as damaging, because the lawyers had to be paid and did not always have a sufficient grasp of Māori custom to represent properly the interest of their clients. This often dragged out cases, as Pākehā lawyers pursued irrelevant lines of argument and cross-examination, adding to costs. Many lawyers were also implicated in fraudulent dealings designed to part Māori from their land.[32]

The 1873 Native Land Act saw the ultimate culmination of the anti-tribal policy of the government. It also answered many of the criticisms of Martin and Shortland concerning the dis-possession of those not named on certificates, as all people found to be interested (including children, the mentally ill, and even children in the womb)[33] were now to be listed on the Memorial of ownership, which replaced the certificate of title. The consent of all was needed before the land could be dealt with in any way. Before the land could be sold or leased, the memorial had to be endorsed by the Court, a memorandum of transfer had to be signed by all the owners, and the memorandum then exchanged by the purchaser for a Crown grant. Gaining the signatures of all

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30 'Memorandum on the Operation of the Native Lands Court, by Dr. Edward Shortland' AJHR 1871 A-2; 'Memorandum on the Operation of the Native Lands Courts, by Sir William Martin' AJHR 1871 A-2A

31 'Shortland Memorandum', p.6; The Hon. Colonel Haultain to the Hon. D. McLean, 18/7/1871 in 'Papers Relative to the Workings of the Native Land Court Acts', p.4; Wiremu Hikairo, ibid. p.31

32 'Martin Memorandum', p.4; 'Shortland Memorandum', p.6; Evidence of Te Wheoro and Paora Tuhaere, 18/2/1871 in 'Papers Relative to the Workings of the Native Land Court Acts', p.26

33 Native Land Act 1873 s.54; 'Native Land Laws Report', p.viii

owners was impractical in almost all circumstances, and led to numerous subdivisions and illegal leases.[34]

The trustee role of the chiefs and kaumātua, which had sometimes but not always been abused under the old Acts, was swept away. In an 1884 memorandum to the Government, former parliamentarian and prominent lawyer W.L. Rees pointed out that a single owner had the power to seek a partition or to lease out his or her individual share, giving settlers a legal right to be on the property even if the others opposed their presence. This was to the detriment of the rest of the owners.[35] He also observed that it was generally those with the greatest traditional interest who lost out:

> In most purchases it is, as a matter of course, the people, who own little or nothing in the land, that first sell [Rees was referring in particular to former *taurekareka* and their descendants who were included as owners]; but, not withstanding this, the tendency of the Native Land Court has been, in cases of subdivision, to make all the owners equal, and this though Act after Act has been passed by the Assembly declaring that the owners of Native land shall not be held to be equal.[36]

Rees, who had had considerable involvement with Māori on the East Coast,[37] suggested certain remedies for the problems he had emphasized in his memorandum. Central to these was the need for land to be dealt with on a tribal basis, with decisions to be made by committees chosen by the owners of the various tribal blocks, on the analogy of a joint-stock company.[38] However, such a provision for incorporation was not introduced into Māori land legislation until 1894.

The emphasis on individualization of the title in the 1873 Act went against the earlier judgments of Fenton, where he had found completely against the existence of individual title, and against the policy of former Governor Grey, who had preferred to see Māori conduct their

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[34] 'Rees Memorandum', p.2; 'Native Land Laws Report', p.vii

[35] 'Rees Memorandum', p.3

[36] ibid. p.3

[37] Rees had been involved in helping Ngāti Porou challenge past land sales, and in attempting to establish land trusts on the East Coast to support Māori agriculture and prevent alienation. These trusts were to be administered by Rees and local parliamentary representative Wī Pere, in consultation with block committees. The legality of these trusts was successfully challenged in the Supreme Court and this and other similar ventures by Rees were ultimately failures, although they did influence later Liberal land policy. The Dictionary of New Zealand Biography: Volume Two 1870-1900 Wellington: Bridget Williams Books & Department of Internal Affairs, 1993, pp.409-410; Orakei Report, p.50

[38] 'Rees Memorandum', pp.4-5

business through a more traditional *rūnanga* system.[39] The Act, largely the doing of the Native Minister Donald McLean, also contained many important safeguards.[40] Section 44 removed Pākehā counsel and agents from the Court, but allowed claimants to choose a conductor from among their number. Judges were to undertake preliminary enquiries to check the bona fides of each application for investigation of title (section 38), and where grantees sought to sell their land, the judge was to ensure that the transaction was fair and that Māori fully understood the consequences of their actions (sections 59-60). District Officers were to be appointed to ensure that reserves of at least 50 acres per capita were set aside (sections 21,24), which would ensure that people were not left completely landless, but this provision amongst all others was most ignored by the Court.

The complexity of the Act meant that many of these important provisions were never implemented.[41] Few District Officers were appointed, and thus no 'Domesday Book' of tribal and hapū holdings was drawn up under the Act, as McLean had intended, while the old chiefs were still alive. Neither was the 50 acres reserve provision widely implemented — if judges did not take it upon themselves to reserve land as title was investigated, there were few District Officers to ensure that this was done. Fenton in particular took little heed of the law in this respect.[42] The entire Act came in for criticism in later years, particularly in the Rees Memorandum of 1884 and the report of the Commission Appointed to Inquire into the Subject of the Native Land Laws of 1891,[43] both of which looked specifically at Māori land laws. Rees

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[39] Fenton Important Judgments, p.41 [Kaitorete Judgment, 1868]; 'Sir George Grey's Plan of Native Government' AJHR 1862 E-2, pp.10-12; 'Native Land Laws Report', pp.viii-ix; B.J. Dalton War and Politics in New Zealand 1855-1870 Sydney: Sydney University Press, 1967, pp.146-150; M.P.K. Sorrenson 'Māori and Pākehā' in Geoffrey W. Rice (ed.) The Oxford History of New Zealand Second Edition Auckland: Oxford University Press, 1992, pp.149-150; Ward A Show of Justice, pp.125-126

[40] McLean and Fenton had been personal rivals since the 1850s, and continued to be political rivals on the national stage. Fenton sought influence over Māori policy for the Native Land Court, while McLean's ambitions lay with the Native Department. Fenton had been instrumental in drafting the 1865 Act at a time when McLean had temporarily withdrawn from national politics. See Dalton, pp.71-72; Ward A Show of Justice, pp.93-94,251.

[41] 'Rees Memorandum', p.2; Evidence of F.D. Fenton, 'Native Land Laws Report', p.47; 'Mackay Report', pp.12-13

[42] 'Native Land Laws Report', pp.ix-x; Waitangi Tribunal The Te Roroa Report 1992 (Wai 38) Wellington: Brooker & Friend, 1992, pp.75,92-93; Ward A Show of Justice, pp.255-256

[43] This Commission was chaired by Rees, with James Carroll and Thomas Mackay as members. Carroll was a part-Māori M.P. with considerable experience in both Pākehā politics and Māori land matters. He was later to be the first Māori cabinet minister. Mackay was the Native Reserves Commissioner.

commented in 1884 that "the new Act of 1873 combined to some extent the evils of both the former Acts, with scarcely any of their advantages".[44] In 1891 the Commission reported the effects of the Native Land Acts, especially the 1873 Act:

> So complete has the confusion both in law and practice become that lawyers of high standing and extensive practice have testified on oath that if the Legislature had desired to create a state of confusion and anarchy in Native-land titles it could not have hoped to be more successful than it has been.[45]

Following the 1873 Act, there were a few minor amending Acts passed in subsequent years. Subdivisions were made easier to get in 1874; in 1877 the Crown was allowed to appear to have its interest in any block determined; and in 1878 lawyers were allowed back into the Court at the discretion of the judge. The next Native Land Act, in 1880, did not offer anything radically different. It required that the boundaries were to be determined before the land would be dealt with (sections 16-17), which necessitated claimants finding sufficient money to pay surveying costs. Judges were also empowered to partition land during the investigation (section 34), and to partition off the interest of any individual named in a certificate of title if they so wished (section 43). This broke the land up further and weakened any corporate controls remaining over Māori land.

The 1880 Act also ushered in a period of frantic law-making regarding all aspects of Māori land. The 1882 Native Land Division Act made it even easier for owners to partition Māori land. An 1883 amendment to the 1880 Act once again removed lawyers from the Courts, because their use tended to favour the party or parties which had made arrangements to sell the land (these groups usually being financially backed by the prospective purchaser, although the practice was illegal). The use of lawyers was recognized by the Native Minister Bryce and the Māori members of the House to be the detriment of both the party which bore the cost of legal representation, and to the others who could not afford the presence of a Pākehā 'expert' in Court. This act also returned to a policy of Crown pre-emption in some districts, at the request of Ngāti Maniapoto and others who wanted the *Rohe Pōtae* or King Country lands investigated in the Native Land Court but who were reluctant to do so under the existing system.[46]

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[44] In that all the owners were included on the memorial of ownership, but hamstrung by the complexity of the regulations. 'Rees Memorandum', p.2

[45] 'Native Land Laws Report', p.xi

[46] Mr. Bryce, Native Minister, NZPD 45 (1883), pp.456,458-459; Hone Mohi Tawhai, MHR Northern Māori, ibid. pp.466-467; Wiremu Te Wheoro, MHR Western Māori, ibid. p.517; Henare Tomoana, MHR Eastern

A few more important pieces of legislation were passed in 1886, following scathing criticisms such as those made by Rees in his 1884 memorandum. The first of these was the Equitable Owners Act, which somewhat tardily sought to remedy the injustices of the 1865 Native Lands Act. The 1886 Act recognized that the ten owners named on the certificate of title under that Act were often intended to be trustees for their tribe, hapū, or community, but in fact they had become outright owners. The Court was given authority to re-investigate the title to any land upon the application of any person claiming to be "beneficially interested", *i.e.* an owner under Māori custom who had not been named on the certificate. If the Court found that a trust had been intended, it could make these people tenants-in-common on the land. These provisions could only be applied where the land had not already been sold or otherwise conveyed, and any lessee's existing rights were to be left intact. Thus the Act usually only gave redress where the original grantees had respected their trustee status, but a number of cases were brought before the Court in the following years under this Act and many people were added to titles.[47]

As well as the Equitable Owners Act there was a Native Land Court Act 1886, which did little more than tinker with the 1880 Act. Since 1873 three names had been needed on an application for investigation of title; this Act returned the requirement to one person. Certificates of title were henceforth to be regarded as Crown grants, and could be alienated or leased without being exchanged for another form of title; the obstruction of surveyors was made an offence; and judges were allowed to put voluntary arrangements (such as land swaps) into effect. Sections 23 to 25 made it even easier for land to be partitioned, at the instigation of the Crown or settlers who had bought a share, as well as Māori.[48] There was also a Native Land Administration Act 1886, which sought to return in practice to Crown pre-emption, as parliamentarians realized that abuses under the open market system (pointed out by Rees and others) had been rife. It was also directed

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Māori, ibid. pp.519-520; Waitangi Tribunal The Pouakani Report 1993 (Wai 33) Wellington: Brooker and Friend, 1993, pp.95-98

[47] Successful cases under the Equitable Owners Act were more common in remote areas where there had been less pressure on Māori to sell, such as the Whanganui Gorge, where a spate of cases were heard in the late 1880s, presumably under the influence of Keepa Te Rangihiwinui's Land Trust. See pages 346,349 *infra*. The Act did not remedy situations such as that at Orakei, where Fenton had deliberately granted land to a handful of owners in 1869, using the provisions of the 1865 Act and ignoring section 17 of the 1867 Act which allowed for other names to be listed in the Court records. See Orakei Report, pp.34,43,153-154.

[48] The Crown's right to have its claim for title investigated dated to the Native Land Act Amendment Act 1877, and the right of any individual with an interest in a piece of land held under certificate of title to have that share partitioned off dated to the Native Land Court Act 1880.

towards the opening up of the *Rohe Pōtae* lands.[49] These key sections of the Act were never brought into operation, however, as Māori were unhappy with the provision that their lands would be placed under a government commissioner who would dispose of them on their behalf, and never brought their land under the Act.[50]

The restrictions on alienation of the 1886 Native Land Administration Act were lifted once again in the Native Land Court Act 1886 Amendment Act 1888. Section 12 of this Act required the Court to ascertain title and then, wherever possible, to partition blocks into parcels each having no more than twenty owners, with no person or company being granted any more than 5000 acres. This led the Rees Commission Report of 1891 to state:

> It is almost more easy to believe that Parliament was playing a gigantic practical joke than that it was in sober earnest calling upon a Court whose work is already notoriously in arrears to commence a new duty such as this.[51]

The report went on to point out that under these circumstances, any divisions made would be largely arbitrary and at the whim of the judge. Coupled with the abandonment of pre-emption in the Native Lands Act 1888, the consequence was a period of even greater alienation of Māori land, held back only by the Court's inability to carry out partitions on the scale envisaged.[52]

Yet more minor legislation followed. An 1890 amendment of the 1888 Act required the signatures of all interested parties before the Court could give effect to voluntary arrangements made by contending parties during the course of a hearing, making such arrangements practically impossible.[53] The Validation of Titles Act 1892 gave the Court the power to legitimize alienations even if there were irregularities, so long as these arose out of misunderstanding rather than fraud. In the words of Native Minister Alfred Cadman, this was because some settlers, "having broken no laws, have had their estates withheld from them on account of technicalities, irregularities, or through some change of the law interfering between the commencement and

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[49] [Native Minister] Ballance NZPD 54 (1886), p.329; [former Native Minister] Bryce, ibid., pp.435-436; Mr. Dargaville, MHR for Auckland West, NZPD 55 (1886), pp.288-289

[50] 'Reports by Commissioners under the Native Land Administration Act, 1886' AJHR 1887 Sess. II G-8; 'Native Land Laws Report', p.xvi; 'Mackay Report', pp.16-17; Norman Smith Native Custom and Law Affecting Native Land Wellington: Maori Purposes Board, 1942, p.18; Orange, p.220

[51] 'Native Land Laws Report', p.xvii

[52] ibid.; Orange, p.221; Ward A Show of Justice, p.298

[53] 'Mackay Report', p.18

completion of their transactions." This confusion had, he said, almost stopped settlement in some parts of the North Island.[54]

The determination of the legitimacy of these claims, many of them disputed purchases, was to be made by the Validation Court, established in 1893, and would often rest upon the hazy area where cross-cultural misunderstanding finished and fraud began. This put those Māori with limited knowledge of the Pākehā legal system at a disadvantage before judges, many of whom were already known for their pro-settler opinions. For example, Judge Von Sturmer said in 1890 that: "I have determined never to place restrictions on Native Land where it is unoccupied."[55] Under such conditions, it became very difficult for Māori to hold on to land that was coveted by Pākehā.

Von Sturmer was not alone in his desire to bring 'waste' Māori land into Pākehā hands. The Native Land Purchase and Acquisition Act 1893 allowed the Governor to declare the Act operational in given districts. A Land Board would be appointed (made up of three senior Pākehā officials, the local Māori member of the House of Representatives, and one local Māori Commissioner appointed by the Native Land Court), and it would decide which lands in the area were to be opened up, be they already investigated by the Court or not. The owners would then have the choice of selling or leasing the land. There were to be safeguards to prevent pā, *kāinga* or cultivations (as defined by the Governor) being sold; and to make sure that sufficient reserves were made. This, and other Acts concerning Māori land introduced by the Liberal administration in the 1890s, were part of a general policy designed to alleviate urban poverty by making vast areas of land available to Pākehā small-holders. However, the burden fell disproportionately upon Māori, as the Government bought a staggering 3.1 million acres of Māori land at an average cost of 6s 4d per acre, compared with the 1.3 million acres at an average 84 shillings per acre obtained from the break-up of the great Pākehā estates.[56]

The Report of the Rees Commission of 1891, which has already been frequently referred to here, was hugely critical of the approach of both the Legislature and the Native Land Court to Māori land, and this led to extensive changes to the workings of the Court (if not its

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[54] NZPD 78 (1892), p.503

[55] Ward A Show of Justice, p.304

[56] Tom Brooking ' 'Busting Up' the Greatest Estate of All. Liberal Maori Land Policy, 1891-1911' NZJH 26 (1992): 78-98, pp.78-79,82-83

purpose) when a new Native Land Act was passed in 1894.[57] Two very important sections of the Act went some way towards addressing the concerns of Rees and others. The first was section 117, which reinstated the pre-emptive right of the Crown over ancestral land,[58] excepting those bona fide transactions already under way. Where Māori wished to sell their land, they were to apply to the local Land Board which would then dispose of the land on their behalf, as if it were Crown waste land. Section 122 allowed Māori owners to incorporate their land where a majority of owners on a block, or adjacent blocks, wished to do so. This allowed Māori to return to a more traditional, corporate style of land tenure and management, and went some way towards addressing the problem of grossly fragmented titles. It made the iwi and hapū once again a viable concept under the Pākehā land laws, even if this provision did apply only in certain parts of the country (including the area around the southern part of Lake Taupō and the Upper Whanganui) at the time the Act was passed.[59]

The introduction of incorporation finally addressed issues which had been important since the days of the Waitara dispute, namely the unwillingness of various governments to acknowledge that customary Māori land was held on a tribal rather than individual basis. Rees had proposed a form of incorporation in his Memorandum a full ten years earlier;[60] and Carroll (by then Minister without portfolio representing the Native race) spoke strongly when the Bill was debated upon the complete unsuitability of individual title for the remaining Māori lands, because of the poor quality of the land and its uneconomic nature when divided into small blocks.[61]

Another meaningful new development was the introduction of a Native Appellate Court, taking appeal cases from the Native Land Court. This offered a degree of extra protection, as in the past the only real avenue for Māori when there had been a miscarriage of justice was to petition Parliament for a specific remedy, the Supreme Court being extremely unwilling to

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57 'Native Land Laws Report' *passim*; 'The Maori Land Courts', p.12

58 James Carroll dissented to this in a minority decision, believing it to be neither lawful nor in the interests of Māori economic development. 'Native Land Laws Report', pp.xxvii-xxx; DNZB Vol. 2, p.79

59 Second Schedule to the Native Land Court Act, 1894. These areas will be dealt with in later cases studies — see Chapters Seven and Eight.

60 'Rees Memorandum', pp.4-5

61 NZPD 86 (1894), pp.380-383

consider issues relating to customary land.[62] It also gave the Supreme Court a forum to which matters of Māori custom could be referred (section 92). As well as these innovations, the new Act drew together many of the piecemeal provisions of the earlier Acts regarding Court powers, such as investigating whether trusts had been intended but not implemented, and apportioning rent moneys. Alienations had to be approved by the Court, after the judge had determined that all was legitimate and above board, and that the sellers had sufficient land left for their maintenance. Pākehā lawyers were allowed before the Court, but only with the judge's permission, which could be revoked at any time. Land investigated under the Act now also became freehold land, with certificates granted under the Land Transfer Act upon the granting of the title by the Native Land Court.[63]

Following this tidying up of the Māori land legislation, relatively few amending Acts of any moment were passed in the remaining years of the century. One of the very few important provisions was that of the Native Land Laws Amendment Act 1895 which allowed the Court to annul partition orders where they had not been and were not likely to be implemented, and to start over, not making partitions at all unless it could be done fairly. It also allowed Māori to lease out their land without showing that they retained a sufficiency for their own support. The next major change to the workings of the Native Land Court did not come until 1909, by which time almost all customary land had passed through the Court. The Court's role then changed to one more concerned with administration than the determination of title.[64]

Structuring evidence — Māori in the Native Land Court

The forms and practices of the Native Land Court, as dictated by the provisions of the legislation in force, the Court's own rules, and the proclivities of individual judges, had a profound effect upon the ways in which Māori presented their cases to the Court. This was an inevitable process, as claimants adapted their traditional modes of expressing their relationship with the land and waters and their property rights in order to present their cases in the format

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[62] Ward A Show of Justice, pp.184,289

[63] Native Land Court Act, 1894, s.73; Smith Native Custom and Law, p.12

[64] 'The Maori Land Courts', pp.12-13

which would be most likely to find favour with the presiding judge. It is important to bear in mind at all times the vital importance of Land Court proceedings to Māori. Once the land was investigated by the Court the ownership of the land was decided irrevocably. Winning cases was a matter of desperate importance to almost all who presented their claims to the Court, with the alternative being the loss of their *tūrangawaewae*, the destruction of their identity and accustomed lifestyle, and a high risk of poverty. This overwhelming sense of finality hung over all the proceedings of the Native Land Court.

Most of the attention of the Court was directed specifically towards land and the occupation thereof, rather than to waters and fisheries. These were generally regarded by the Court as a mere adjunct to the land, to be dealt with incidentally where bodies of water lay within or on the boundaries of the block, rather than to be the subject of any special investigation. There was even some doubt whether the Native Land Court was competent to deal with bodies of water (or, more specifically, the fishing rights of such waters) in isolation from the surrounding land.[65] Under English law, fisheries are tied to ownership of the bed of the water (a simple fishing right being a profit over the land in question), but the water itself is not capable of ownership, a notion arising from feudal principles;[66] in Māori terms the definition is much less straightforward. The concept of an abstract title to the water or bed separate from the tangible uses to which the water was put was nonsensical in Māori eyes. An undisputed right to use and control the use of the waters for fishing (or any other purpose) constituted the ultimate title imaginable before English legal concepts were introduced.[67]

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[65] The case of Kōkoputaua provides an interesting case in point. Iharaira Te Puke claimed the part of Lake Taupō known as Kōkoputaua, a fishing ground. He obviously realized the form required by the Court, saying, "I sent in a claim for the land under the water." The case was dismissed, with no reason given, although it was most probably because the area had not been surveyed. Iharaira Te Puke, Kokoputaua Hearing, 29/3/1872, Taupō Native Land Court Minute Book [MB] 1, p.225. See page 85 and note 105 *supra*, pages 304,310 *infra*.

[66] New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi Wellington: Law Commission, 1989, pp.18,70-72,138; Department of Justice Inter-departmental Committee on Maori Fishing Rights: First Report Wellington: Department of Justice, 1985, pp.4-5,11; Paul McHugh 'The Legal Status of Maori Fishing Rights in Tidal Waters' Victoria University Wellington Law Review 14 (1984): 247-273, pp.254-255. See pages 49-50 *supra*.

[67] 'Report of Royal Commission appointed to inquire into and report on claims made by certain Maoris in respect of the Wanganui River', AJHR 1950 G-2, pp.7-8; *In re the Bed of the Wanganui River* 1955 NZLR 419 at 447 per Adams J; Waitangi Tribunal Finding of the Waitangi Tribunal on the Manukau Claim (Wai 8) Wellington: Government Printer, 1985, p.54; Waitangi Tribunal The Ngai Tahu Sea Fisheries Report 1992 (Wai 27) Wellington: Brooker & Friend, 1992, pp.xvi,99; Amended Claim in Respect of Fisheries, 25/6/1988, Ngai Tahu Claim, Waitangi Tribunal Document Wai 27 #J-7, p.1

The underlying belief that fisheries were somehow inferior on the scale of property rights may have influenced the position of most nineteenth century Pākehā jurists regarding waters and the Native Land Court. Fish were a major source of animal protein for Māori before the introduction of exotic animals such as pigs,[68] while the traditional English diet relied much more on agriculture. As a consequence the land-oriented common law was not equipped to cope with the importance of fishing to the traditional Māori economy.[69] The common law approach was summarized by the Crown's legal officers in 1881, when Wairarapa Moana came before the Native Land Court: "a right to fish was not an interest in land and therefore not within the jurisdiction of the Court."[70] The Government also took away the right of the Court to deal with foreshore fisheries in 1872, exercising its prerogative right to lands in the tidal zone.[71]

Thus when the Court did look at inland waterways and their fisheries, it perceived them as merely another example of resource rights exercised on the land, equivalent to birding or berry-gathering. These resource rights were generally held by judges to be an inferior sort of possession, not usually equal to rights generated by actual permanent physical occupation.[72] The views of the judges can only have encouraged Māori claimants to present evidence of their fishing rights in the form preferred by the Court — that is, as a resource right on the land, reliant on occupation of the land for ratification. This may have been a valid way to examine minor fisheries such as those found in small streams, but it had a number of limitations when it came to dealing with large fisheries where rights of usage were largely separate from occupation of the surrounding land, such as those found at the mouth of Wairarapa Moana.

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[68] Yvonne Marshall 'Maori Mass Capture of Freshwater Eels: An Ethno-archaeological Reconstruction of Prehistoric Subsistence and Social Behaviour' New Zealand Journal of Archaeology 9 (1987): 55-79, pp.71-74; Ngai Tahu Sea Fisheries Report, pp.10-15

[69] Mataitai, pp.9,11-15

[70] Assistant Law Officer, Wellington to Native Land Purchase Office, 22/6/1881, NLP 81/244, Māori Affairs Department file MA 13/97, National Archives. However, in 1912 the Court of Appeal found that the Native Land Court could "determine upon proper evidence ... whether or not the Maoris were the owners of the bed of any lake or part thereof according to Maori custom, or whether they had and have merely a right to fish in its waters." *Tamihana Korokai* v. *The Solicitor-General* [1912] 32 NZLR 321 at 321.

[71] See pages 84-85 *supra*.

[72] *e.g.* the judgment of Alexander Mackay in the Otaupuaroaro case of 1890, which dealt with swamp land suitable only for fishing, but still sought evidence of occupation to strengthen evidence of widespread fishing on the land: 9/4/1890, Wairarapa MB 13 p.295. See also Chief Judge Seth-Smith, Omahu Block Judgment 1891, quoted in Smith Native Law and Custom, pp.51-53; Judges Mackay and Scannell, Mangaohane Block Judgment 1892, ibid. p.53; *In re the Bed of the Wanganui River* 1962 NZLR 600 at 603; see also page 85 *supra*.

The acceptable forms of evidence, as tacitly defined by the Native Land Court in its formative years, not only influenced testimony relating to fisheries, but affected all aspects of traditional Māori land tenure. In the early years, when a maximum of only ten owners were granted absolute ownership (1865-1867), or were given the right to lease out the land (1867-1873), claims tended to be presented by hapū groups. This was done in order to get as many as possible of their kaumātua included in the title, as judges usually granted land to representatives of the hapū found to be owners of the land. Even after the 1873 Act introduced fully individualized titles to Māori land, cases continued to be presented and argued by hapū groups. There were sound reasons for doing so. All land, when considered on a large scale, was hapū land, held communally; and individuals always identified strongly with their hapū. It was only on a smaller scale, when considering cultivations, small eel weirs and the like, that there could be said to be anything approaching individual or personal rights. Even then it was not a form of title readily understood by those steeped in English legal practices.

Economic factors also came into play when bringing cases before the Court. Surveys, investigations, living costs while attending the Court, and partitions all cost substantial amounts of money, which had to be found somehow, often by selling all or part of the land investigated. This discouraged the introduction of claims to small blocks by all but the most wealthy of claimants, or those who had mortgaged the land or negotiated its sale in advance to pay their bills. Even after 1873, it made economic sense for a hapū to pool its resources when bringing forward a case. Most of its members would have very similar rights on the land, and so cases could be conducted more quickly and cheaply by acting as one party. Lists of individual members of the hapū would then be presented to the Court when it came to determining individual shares, as required by the legislation.[73] While it was natural for Māori to present their claims for land before the Court in terms of their hapū rights, this poses a number of difficulties when one attempts to reconstruct a picture of fishing rights from the evidence given before the Court.

The concentration on the rights of the hapū tended to disguise the fishing rights (and other resource rights) of larger and smaller whānau groups. In all but the most closely contested cases, fisheries tended to be treated simply as a part of the hapū domain. While the names of people who used the fishery might be mentioned, explicit details relating to their right to do so are

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[73] 'Rees Memorandum', pp.3-4; Ward A Show of Justice, pp.186,212,253; Angela Heather Ballara The origins of Ngāti Kahungunu unpublished PhD thesis, Victoria University of Wellington, 1991, pp.504-505

not often found. Generally, it is only in those cases where there was a great deal of dispute over land and resource use that a clearer picture of the exercise of fishing rights presents itself. These cases often related to small areas, which were almost always the most closely contested — there were fewer resources to go around and the inclusion of those with only a weak connection to the land was less likely to be tolerated.[74] This emphasis on those cases where resource rights were in dispute tends to indicate a state of greater antagonism than was in fact the case in day-to-day life, but there were some investigations which went into sufficient detail to illustrate the more commonplace particulars of the exercise of fishing rights.

The predisposition of the Court towards cases presented by hapū groups affected the perception of fishing rights in other ways. Not only were the rights of whānau and individuals largely marginalized, but the rights of communities (that is, groups defined primarily by common residence, as opposed to hapū, which were defined by descent from a common ancestor) were often neglected in favour of hapū claims. There was often a significant correspondence between the hapū and the community, but it was also common for communities to be comprised of members of a number of hapū, drawn together by marriage ties.[75] The emphasis of the Court on the hapū also had the effect of formalizing hapū affiliations, by associating people with particular hapū in a public and official forum. In earlier times hapū relationships had been much more fluid, with people identifying with the hapū that they had the most to do with at any point in time, or with the hapū from which they derived their rights to any particular resource.[76]

While in the eyes of the Native Land Court judges there could be no ownership without occupation, evidence was needed of some accompanying *take* to validate the occupation. The most common and least easily challenged *take* was *take tupuna*, the ancestral right. It was no doubt easier for claimants to present a convincing case based on the descent of the hapū from a common ancestor who had lived on the land, than to fully explain the far more complicated relationships which had brought all the members of the community onto the land. This approach need not affect the rights in the Court of those living on the land whose rights through *take tupuna*

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[74] Evidence of Judge Puckey, 'Native Land Laws Report', p.69

[75] Te Roroa Report, pp.5,7; Ballara The origins of Ngāti Kahungunu, p.291; Joan Metge The Maoris of New Zealand: Rautahi London: Routledge & Kegan Paul, 1976, pp.6-7

[76] Te Roroa Report, p.7; Anne Salmond 'The Study of Traditional Maori Society: The State of the Art' JPS 92 (1983): 309-332, p.323

were weak, as their names could still be included in the lists submitted to the Court for inclusion in the title by the successful claimants for the land.

While the hapū-based approach did not necessarily jeopardize the chances of individuals being included on the list of owners submitted by the successful claimants, it did affect the way in which the claim was presented. Where *take tupuna* was put forward, as was usual in most cases, claimants sought to show that any fishing rights on the land had been exercised over the generations by themselves and their ancestors. It would not usually have been expedient to attempt to demonstrate that a fishing resource was associated, say, with the habitation of a particular pā or *kāinga* rather than with a descent line, even if this were in fact the case. This can be seen when particular cases are studied with special reference to whakapapa and evidence relating to residence. On a number of occasions, witnesses told the Court which people of the hapū worked a particular eel weir or other small fishing area. When one examines the comprehensive whakapapa given by the conductor of that hapū's case, these people would often be found to be fairly distant relations. Yet reference to other evidence would show that they were much more closely related through another family line, or by marriage, or were associated in another way such as residence in the same *kāinga*.[77] However, these relationships are often difficult to determine where the evidence is more scanty.

While many investigations heard evidence relating to the occupation of the land from the earliest days until the time of the hearing, the Court generally made its judgments on the basis of who had owned the land in 1840. This policy dated back to the very earliest days of the Court. Chief Judge Fenton, sitting with his fellow Native Land Court Judges Rogan and Monro as the Compensation Court,[78] enunciated the 1840 rule in the Oakura judgment of June 1866. They found that before the establishment of British government in 1840, "the great rule which governed Maori rights to land was force".[79] However, once the rule of British law had been introduced, the

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[77] Marshall, pp.71-74; Ngai Tahu Sea Fisheries Report, pp.10-15. See for example page 375 *infra*.

[78] Following the New Zealand Wars of the 1860s, vast tracts of the North Island were confiscated from Māori in areas where there had been 'rebellion', under the New Zealand Settlements Act 1863. These lands included the lands of many Māori who had not fought against the Crown, and the Compensation Court sat to determine which parts of these confiscated lands should be returned to 'loyal' Māori. The rest was given to military settlers or sold.

[79] Fenton, p.10

rule of force could not be permitted.[80] Titles were to be regarded as settled as of that time, "except in cases where changes of ownership or possession have subsequently taken place, with the consent, expressed or tacit, of the Government, or without its actual interference to prevent these changes." There was a caveat appended to this finding, regarding the application of the rule to the Native Land Court: "Of course the rule cannot be so strictly applied in the Native Lands Court, where the questions to be tried are rights between the Maoris *inter se*, but even in that Court the rule is adhered to, except in rare instances."[81]

The general applicability of the 1840 rule to the Native Land Court was confirmed by Fenton in the Tiritirimatangi case of June 1867, when he rejected the submission of counsel that 1865, the date of the empowering legislation, should be the date used to establish title.[82] There did prove to be a degree of flexibility in the rule, with fairness rather than strict adherence to the law being the determining factor in borderline cases. For example, in the Wairarapa Valley in the 1830s, the bulk of the Ngāti Kahungunu population fled northwards to escape an incursion of Te Āti Awa, but returned in the summer of 1841-1842 when the worst of the threat was over. When the district was investigated by the Court, the land was granted to the various Ngāti Kahungunu hapū because the occupation of Te Āti Awa was deemed to have been merely transitory, with no permanent right having been established, despite the fact that they were in occupation during the key year of 1840.[83] The 1840 rule was not relevant in all areas, but where it was it influenced claimants in that they had to stress the nature of their occupation at that time, or fight hard to avoid disinheritance. Some tribes were in fact left largely landless, victims of the constant state of warfare in the North Island in the 1820s and 1830s, and the mass migrations which were the result of external factors such as the desire for Pākehā trade goods, accessible at a limited number of coastal sites where the traders situated themselves.[84]

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[80] Not specifically stated in this case, but see Orakei Judgment, December 1869 in Fenton, pp.86,94-95; Smith Native Law and Custom, pp.49-50; Norman Smith Maori Land Law Wellington: A.H. & A.W. Reed, 1960, p.88

[81] Fenton, p.10

[82] ibid. p.24

[83] See pages 194-196, page 201 note 70 *infra*.

[84] James Belich Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century Auckland: Allen Lane/The Penguin Press, 1996, pp.148-152,161-164; Bryan D. Gilling 'The Maori Land Court in New Zealand: An Historical Overview' The Canadian Journal of Native Studies XIII, 1 (1993): 17-29, p.23; Bryan D. Gilling 'By Whose Custom? The Operation of the Native Land Court in the Chatham Islands' VUWLR 23(3) (1993): 45-58, pp.48-49,54; Sorrenson 'Māori and Pākehā', pp.159-160; Ann Parsonson 'The Challenge to Mana Māori' in The Oxford History of New Zealand Second Edition, p.172

The evidence given in the Court was not always truly indicative of the reality of the ownership of the block, and as a result the Court's investigation process did not always ensure that the rightful owners under Māori customary tenure were granted the land. Under most of the Native Lands Acts, an investigation could be instigated by a single claimant. Except for a few years in the 1870s, the Court was not obliged to advise all those interested in the land that a hearing would be held. If no other parties turned up, the land would be granted to the claimants, regardless of whether they had the best claim to the land. The legislators had presumed that Māori would act in good faith in bringing their lands before the Court, but many individuals who found themselves in financial difficulties, or who were offered money by Pākehā land speculators, succumbed to the temptation to bring cases for land over which they did not have the best claim.[85]

Even where those hapū which did have the best claim to the land were granted it, a number of people with more uncertain rights were often included in the title. After 1873, with shares being granted to all those who could show an interest in the land, many grantees were in fact *taurekareka* (captives taken in war and kept as virtual slaves) or their descendants. The position of these *taurekareka* was rather different after the introduction of Christianity, when they regained their personal freedom, but the blow suffered to their mana by being captured was so great that many chose to stay with their captors rather than to risk rejection on their return to their home community. Some had made new lives for themselves already, marrying into their new community. Others who had prized skills had always retained some of their personal mana because of their value to the community. Their customary rights to the land were rather tenuous, but the new laws gave them status on the land and the ability to initiate proceedings which may have been against the interests of the customary owners.[86]

Sometimes other people without apparent rights to the land were admitted willingly by claimants through *aroha*, or goodwill. The reasons for doing so might be that they were chiefs of mana in the district, spouses of owners, holders of a firm but informal connection with the land, or because they had missed out unfairly on blocks already investigated. The attempted inclusion of these people often led to disputes when the Court attempted to determine relative interests and

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[85] 'Martin Memorandum', p.4; Te Wheoro to Col. Haultain, 23/5/1870, in 'Papers Relative to the Workings of the Native Land Court Acts', p.28; Wiremu Hikairo, ibid. p.31; Ward, pp.186,213,253; Ballara The origins of Ngāti Kahungunu, pp.504-505; *e.g.* evidence of Taiaura, Otamoa No. 1, 24/4/1878, Whanganui MB 2 p.78

[86] 'Rees Memorandum', pp.2-3; F. Allan and Louise Hanson Counterpoint in Maori culture London: Routledge and Kegan Paul, 1983, pp.182-185; Smith Native Custom and Law, pp.67-68

to subdivide blocks with reference to the resource rights of all interested, as various parties tried to get good shares for those they wished included.[87] There was an example of the different grounds for inclusion given in the Whanganui Land Court. Ratana Te Urumingi, a regular visitor to the Court, put forward a claim to the Ramahiku No. 1 Block, part of a previously investigated block from which his wife had been omitted through her absence. He told the Court that:

> I have lived on the land. I am not in this tribe. I have lived there thro' my wife's right who was brought up by the owners of the land ....
> I am not aware that Kemp [Te Keepa Rangihiwinui] has any right on this land. I believe his name is put through 'mana'.[88]

Many of those who appeared were not so forthright when it came to the inclusion of people through *aroha*. Judges tended to respect the wishes of those successful claimants who sought to admit others through *aroha* where these wishes were unopposed by the other grantees, or supported by the influential chiefs connected with the block.[89]

The effects of the particular forms imposed on Māori testimony by the provisions of the legislation and Court rules, and the attitudes of the judges, are not the only factors to be taken into account when assessing Māori evidence of fishing rights in the Native Land Court. The peculiarities of all types of interested testimony must also be kept in mind. Not only was the Native Land Court an adversarial forum like any other court proceeding, it was an extremely personal forum. Rival claimants for land usually knew each other and were often fairly closely related. Thus personal relationships and rivalries unrelated to the hearings were brought into the Court, influencing the way in which people conducted their case. On a number of occasions, claimants even admitted that their motives were personal. Ahitana Mātenga told the Court in the long and involved investigation of the Tipua Mapunatea block, on the shores of Wairarapa Moana, that "Paratene is a younger relative of mine his claim is at Otaupuaroaro but he objected to my claim and consequently I object to his."[90] Similarly, Parokopu Patapu objected to the claim of his uncle

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87 'Rees Memorandum', pp.2-3; Smith Native Custom and Law, p.79. See for example the convoluted explanation of the role of marriage ties and goodwill in the leasing of Wairarapa lands, given in the Claimants' Statement of Case, Tipua Mapunatea, 9/4/1890, Wairarapa MB 13 p.317

88 Ramahiku No. 1, 13/9/1894, Whanganui MB 22 p.107

89 See for example Karehana Tahau, Kaiwhaiki Partition, 8/12/1897, Whanganui MB 36 p.129; Judgment (Judge Ward), 18/12/1897, ibid. pp.185-187

90 Tipua Mapunatea, 7/3/1890, Wairarapa MB 13 p.164

Wiari Tūroa at the Waipakura partition hearing in Whanganui because Wiari had not consulted the others interested in the land before bringing his claim.[91] When tensions such as these are stated or are discernible from the tenor of the proceedings, they can be taken into account, as can obvious partiality; but much other evidence must have been affected by personal relationships which are no longer apparent.

It was not always rival claimants who made their mutual dislike clear. Judges occasionally showed a great deal of impatience with and dislike of certain claimants, which sometimes even spilled over into their decisions. This was particularly noticeable in partition cases where some owners had sold their interest in the land but others had not, and it was up to the Court to divide the block between the remaining owners and (usually) the Crown. Some judges had little time for those who had not sold, especially if they believed the land to be 'waste' land which could be put to better use by settlers.

A notable example of judicial ill temper occurred in the subdivision hearing for the Waimarino block, which stretched across half a million acres of rugged bush land on the Upper Whanganui and Central Plateau. All but 101 of the 1006 owners had sold their shares to the Crown. The judgment of Judges Macdonald and Puckey referred to their dissatisfaction with the hearing:

> The witnesses excepting Wiremu Kiriwehi were very reluctant in giving reliable evidence indeed it soon became apparent to the Court that there was a wide spread conspiracy to defeat the application of the Crown in which the sellers both chiefs and people were implicated.[92]

It was not only the sellers who had raised the judges' ire. After determining the interests of those hapū who had not sold, they told the various parties that "The Court will proceed tomorrow to allocate the several awards now made and it will be the non-sellers' own fault if they are located on the precipices and pinnacles."[93] The attitude that Māori were somehow doing something wrong by not selling land that the Crown wanted to buy is reflected in the pejorative language of Alexander Mackay, a Native Land Court judge, in his report on Māori claims to the Wairarapa Lakes: "Considerable difficulties had to be encountered at the outset to break down the confederacy that had been formed by the Natives against alienating their land to the

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[91] Waipakura Partition, 11/9/1894, Whanganui MB 22 pp.98-99

[92] Waimarino, 5/4/1887, Whanganui MB 13 p.146

[93] Waimarino Subdivision, 5/4/1887, Whanganui MB 13 p.149

Government."[94] Such decisions must have left large numbers of Māori feeling distrustful of the Court system, and would doubtless have influenced their attitudes if they appeared in later cases.

Not all judges behaved in a like manner. Some heard cases in an atmosphere more reminiscent of a *rūnanga* meeting, and acted more as facilitators than judges. One such judge was Robert Ward, who had a stated policy of letting Māori do most of the investigation themselves, especially in partition cases. He told the 1891 Native Land Laws Commission:

> My practice is, in all cases of partition... to say to them in Maori... 'Now, this is your land.... In partitioning your land we may happen to run a boundary through your plantations.... I would ask you, therefore, as the owners, to go outside, quietly think the matter over, and all parties give and take.'... I was determined they should be satisfied with the decisions, and that those decisions should be fair and just.[95]

Ward put his beliefs into practice while sitting in the Whanganui area. In the Morikau hearing, he frequently asked the crowd in the Court to signal their assent or otherwise on issues such as the ancestors from whom rights were to be traced.[96] This meant that cases were heard more quickly, keeping costs down, and the outcome was more likely to be fair to all involved. However, from the historian's point of view, much of the detailed evidence which arose from lengthy disputes that occurred in other cases is unavailable for consideration.

Numerous contemporary observers commented on the way in which Māori carried on their old battles in the new form presented by the Court.[97] Māori society was by tradition competitive, with the food resources of the hapū being an important aspect of its competitive capacity. The ability to provide generous hospitality for visitors and to return gifts with interest was necessary to preserve the collective mana of the tribe, and the presence of luxury food resources within the tribal *rohe* was particularly prized.[98] This competitive character was still

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[94] 'Claims of Natives to Wairarapa Lakes and Adjacent Lands - Report by Mr. Commissioner Mackay' AJHR 1891 G-4, p.1

[95] 'Native Land Laws Report', p.131

[96] Morikau, 10-11/1/1899, Whanganui MB 39 pp.286-288; Judgment, ibid. 10/2/1899, MB 40 p.56

[97] 'Shortland Memorandum', p.6; 'Native Land Laws Report', p.xi; Judge Robert Ward, ibid. p.130; Ballara The origins of Ngāti Kahungunu, pp.523-524; Smith Maori Land Law, p.8; Ward A Show of Justice, p.254

[98] Ann Parsonson He whenua te utu (The payment will be land) unpublished PhD Thesis, University of Canterbury, 1978, pp.35,51,63; Ann Parsonson 'The Expansion of a Competitive Society: A Study in Nineteenth-Century Maori Social History' NZJH 14 (1980): 45-60, pp.47-53; Bill Dacker The People of the Place: Mahika Kai Wellington: New Zealand 1990 Commission, 1990, p.14; Mataitai, pp.32-35; Ngai Tahu Sea Fisheries Report, pp.10-15

evident in the latter half of the nineteenth century, and in the Court. Some early Pākehā participants in the Court process seemed to regard this as mere disputatiousness, or worse, on the part of the claimants. The Rees Commission Report of 1891 stated that:

> The Natives, being compelled to enter the arena of the Court and contest the title to land,... learned to look upon our method of getting land as merely another form of their old wars. Formerly they fought with guns, and spears, and clubs; now, to accomplish the same end, the defeat of opponents and the conquering of territory, they learned to fight with the brain and the tongue. As in the olden time all means were fair in war, so, pitted by our laws against each other in the Courts, they held all stratagems to be honest, all testimony justifiable, which conduced to success.[99]

There was however much more to it than expansionist zeal. Victorian disapproval of the mores of Māori warfare, which were not always in accord with English concepts of 'fair play', shines through Rees' comments, but it must be remembered that by and large Māori were playing by their own rules.

Cases were not disputed simply to score points over old rivals. The work of the Court had serious consequences for claimants, especially those who were unsuccessful. Land, once gone, was gone forever, and unlike the old days, there was no redress. The adoption of Christianity had led most Māori to renounce the use of force as a means of dispute resolution, and in any case attempts to resolve disputes by force would be quelled by the full weight of the Pākehā justice system. The Court did have authority in Māori eyes, and so the mana of the claimants and their kin was also at stake.[100] Under these circumstances Māori fought hard for their land, using all the means at their disposal. Most of the ancient disputes which were brought before the Court were not fabricated, but were old claims and disagreements which had been resurrected because of the prospect of the land being investigated by the Court.[101] Often these disputes were known to only a few of the most senior and knowledgeable members of the hapū. Old, legitimate issues could come to be seen as arcane, irrelevant, or merely speculative, simply because the details had been lost over time.

As with most court-room proceedings, the evidence given by the different parties was almost always partisan, and directed towards strengthening their claim while undermining that of

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[99] 'Native Land Laws Report', p.xi

[100] Steven Chrisp 'The Maori Occupation of Wairarapa: Orthodox and Non-orthodox Versions' JPS 102 (1993): 39-70, p.52; Ward, p.254

[101] 'Shortland Memorandum', p.6; Smith Maori Land Law, p.6

others. This required the suppression or downplaying of unflattering evidence and the manipulation of whakapapa. Many judges also believed that it frequently involved out-and-out lying, reflecting the Anglocentric empirical mind-set held by many of them;[102] but some later commentators have queried whether this was as widespread as once supposed. They have emphasized that blatant falsehoods would probably have been laughed out of Court by the spectators, and cases were often vetted by *rūnanga* before submission to the Court.[103]

Friction between rival claimants was most commonly expressed through differing whakapapa. Whakapapa was usually interested testimony, as many individuals had double or multiple lines of descent from key ancestors. They promoted the most senior and direct of these to the exclusion of others which might be more relevant on the land in question, but which suggested a lower social status. Alternatively, claimants might promote whakapapa which showed them having strong rights to the land, although they were associated primarily with a different set of relatives in a different area. The birth order of siblings could be of particular importance if claimants were relying on descent from a line of superior chiefly mana to enforce their rights, and this was an especially fruitful area of dispute. In the Tipua Mapunatea case, Hōhepa Aporo and Tamahau argued over which of Te Rakato and Te Werenga, sons of the important chief Te Hiha (who lived some five generations previously), was *tuakana*, and by extension, which of the two hapū descended from them should take precedence.[104] Even when knowledgeable kaumātua began to commit the precious information concerning the whakapapa of their hapū to writing for posterity, the disputes continued.[105] When the Court came to determine relative interests in the Whakaihuwaka block in the Whanganui valley, Te Keepa Tahukumutia and Wīremu Kiriwehi challenged the accuracy of each other's whakapapa, even though both had been drawn up by the same expert, Karaitiana Te Mutu.[106]

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[102] Judge Puckey, Te Kahakaha, Whanganui MB 13 p.76; Judge Robert Ward, 'Native Land Laws Report', p.130

[103] Manatū Māori Customary Māori Land and Sea Tenure Wellington: Manatū Māori, 1991, p.7; Ballara The Origins of Ngāti Kahungunu, pp.526-527

[104] Hohepa Aporo, Tipua Mapunatea, 25/10/1888, Wairarapa MB 9 p.469

[105] These whakapapa books became *taonga* of the family and were very jealously guarded, partly because the information they contained would be so valuable to those preparing a rival claim. See Michael D. Jackson 'Literacy, Communications and Social Changes' in I.H. Kawharu (ed.) Conflict and Compromise Wellington: A.H. & A.W. Reed, 1975, p.39; Apirana T. Ngata 'Tribal Organization' in I.L.G. Sutherland The Maori People Today: A General Survey Christchurch: Whitcombe and Tombs, 1940, p.160

[106] Te Keepa Tahukumutia, Whakaihuwaka Interests, 12/2/1898, Whanganui MB 36 pp.318-319,325-326

It would be tempting to conclude from this description of the inherent difficulties posed by the evidence presented before the Native Land Court in the nineteenth century that its records are too deeply flawed to be of much use to the historian. On the contrary, these records are of extraordinary value, for a variety of reasons. Most importantly, they form by far the largest single source for the history of Māori society in the pre-contact and early contact periods, much of which may have been lost otherwise. Not only is the evidence extremely voluminous, but it is often also extremely detailed. Each investigation of title brought with it evidence of the history of the occupation of a particular area, with supporting whakapapa. This testimony often delved back as far as the days of the early migrations, and knowledgeable witnesses might take days or weeks to impart what they knew of the people who had occupied the land over generations. Their evidence often also showed an intimate acquaintance with the land and its resources. The analyses of fishing rights in particular districts given in the second part of this thesis are based largely on the testimony of Native Land Court witnesses who spoke of the fishing resources of their area and the ways in which rights were exercised. Not many people gave detailed descriptions of the fishing process, but there is enough evidence spread across various hearings, from a number of different witnesses, to see patterns emerging.

As well as being the largest source of information regarding traditional resource rights, evidence given in the Native Land Court minute books often came from those who had actually exercised resource rights on the land, and were able to speak of them at first hand. As time wore on, more and more claimants were too young to have led a strictly customary lifestyle themselves, but even they often were experienced in surviving traditional practices such as expeditions to take migrating eels. They were also schooled in their ancestral rights by those who had learnt the information as young people living on the land. Thus much of the evidence is contemporary or near-contemporary, and it comes not from a few self-appointed sages but from a vast array of people of all social stations. The evidence of the chiefly families is particularly well-presented, as it was they who were traditionally taught the history and whakapapa of their hapū and iwi in the greatest detail, through the *whare wānanga* or school of learning.[107]

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[107] Te Rangi Hiroa 'The Value of Tradition in Polynesian Research' JPS 35 (1926): 181-203, p.185; Elsdon Best The Maori School of Learning: Its Objects, Methods, and Ceremonial Wellington: Dominion Museum, 1923, pp.5-6,12,14-15,25; Makereti [Papakura] The Old-Time Maori Auckland: New Women's Press, 1986, pp.152-154. Michael Reilly has written of the predominance of *rangatira* perspectives in many written works of Māori history: Michael Reilly 'An Ambiguous Past: Representing Maori History' NZJH 29 (1995): 19-39, p.19

The contemporary information found in the Court minutes goes some way towards balancing the nineteenth century published matter concerning Māori tenure and resource rights. This consists almost exclusively of the interpretations made by Pākehā observers of various experience. Apart from a few submissions made to the government by chiefs, Māori were given few opportunities to explain traditional land tenure in their own words.[108]

Finally, and perhaps most importantly, even though the testimony of claimants was partially influenced by what they believed the judge wished to hear, the evidence given in the Native Land Court reflects the priorities held by the participants themselves. They put forward arguments which were designed to uphold their customary rights, and to prove their claims before the other parties as well as the Court. The pertinence of this is succinctly expressed in Manatū Māori's Customary Māori Land and Sea Tenure:

> Criticisms have often been made about the veracity of the evidence presented to the Land Courts; whakapapa was doctored to suit the needs of a claimant, as were stories of battles and so on. Whether this was the case or not does not materially affect the value of that evidence from the viewpoint of this study. What does seem more relevant is that the evidence was what the participants considered to be important in the prosecution of their claims.[109]

Thus, while the evidence given may have obscured rather than illuminated aspects of particular cases because of its partial nature, those same exaggerations and circumventions may help to clarify aspects of resource rights generally, by showing what were the most important, and contentious, facets of those rights.

The nature of the evidence — oral testimony and translations

The minute books of the Native Land Court represent the transformation of oral traditions into written history. In many cases, it was the first time that tribal and hapū history had been written down, after having been transmitted orally for generations. It is important to remember that what appears as text is in fact a transcription of oral proceedings, in which the

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[108] *e.g.* 'Appendix to Colonel Haultain's Report on the Workings of the Native Land Court Acts' AJHR 1871 A-2A, pp.26-31. See Chapter Two Nineteenth century Māori statements on tenure in the Pākehā domain.

[109] Customary Māori Land and Sea Tenure, p.7

rivals presented their differing claims and argued the points of contention. The Court format was not completely alien to Māori, as traditionally disputes among a group were settled (or at least addressed) in a similar way. Rival arguments were presented before the whole community with little deference to rank, and an arrangement would usually be reached after public discussion.[110] Such concessions to courtesy did not, however, mean that debate was not fierce, in either the traditional forum or the Court. This point can be hidden by the processes of translation and transcription.

The transformation process was not only from oral to written, but also from Māori to English. While many judges were fluent in or at least had some grasp of the Māori language, almost all the cases were argued in Māori but recorded in English. Only a few were recorded in Māori. Thus the effects of translation must also be taken into account when examining Native Land Court cases for evidence of resource rights. There are a number of areas in which difficulties might be expected to arise, and without the presence of parallel Māori records (which do exist for some areas, in the form of both records of evidence in Māori and private note books kept by judges in a mixture of Māori and English) the scope of variation between the original and the record can never be defined with any exactness.[111]

One aspect of translation which had a direct effect on the process of giving evidence was that translating slowed down the Court, interrupting the flow of witnesses and adding to the cost of hearings.[112] Such interruptions, by disrupting witnesses' chain of thought, could have a detrimental impact on their ability to present their case in the most lucid and detailed manner, especially if they were unaccustomed to appearing before the Court. Also, while most cases were recorded as near to verbatim as is possible in translation, the evidence in other cases is noticeably abridged. Presumably there are also many cases where condensation has taken place but is not

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[110] Elsdon Best Social Usages of the Maori Wellington: W.E.A., 1918, pp.9-10; Elsdon Best The Maori as he was Wellington: Dominion Museum, 1934, pp.90-91. See pages 14-15,58-59 *supra*.

[111] All the minute books used in the case studies in the next part of this thesis were recorded predominantly in English, although some short passages of evidence were recorded in Māori or a mixture of Māori and English. In the regions studied, there were no minute books written completely in Māori — in Wairarapa, the only cases recorded in Māori did not deal with lake fisheries, in Taupō Judge Scannell's minute books were written in English and so provide only a parallel translation, and in Whanganui the judges' minute books did not deal with any major cases bordering on the river.

[112] 'Martin Memorandum', p.5

readily noticeable. Such abridgment may result either from oversight or from a conscious selection process by the interpreter or the clerk (often the same person), who made his or her own judgments about what information was or was not important to a case, and so added an extra bias to the material before it was recorded.[113]

Interpretation is an extremely difficult skill which is not automatically acquired along with a fluency in two languages, even where this bilingualism dates from childhood. Very few people have a correspondingly full immersion in both cultures and an ability to convey adequately the unspoken messages and assumptions behind the spoken words.[114] As nineteenth century Native Land Court interpreters were largely Māori-speaking Pākehā,[115] their translations may well have been affected by contemporary Pākehā thought on Māori land tenure. On the other hand, the interpreters were people with a high level of immersion in Māori culture, whose normal working environment was Māori-speaking, and the usual standard of translation was undeniably high. Therefore it is valid to use these English translations, although there is the problem of deep cultural difference in some key areas. The most problematic areas were where key concepts in Māori society differed markedly from Pākehā experience, such as kin relationships, and where politically sensitive subjects such as mana and property rights were being discussed.

There is a particular problem with social organization and kinship terminology in the Court records, as there is very little consistency from interpreter to interpreter and case to case. The pressure on claimants to present claims on a hapū basis has already been discussed,[116] but this is not the only reason why whānau involvement is difficult to assess. One major factor is an almost complete absence of the word 'whānau' from the Court records. It has presumably been translated by a variety of terms such as 'family', 'relatives', or 'kin'. For example, while Māori kinship terms such as 'matua', which have a wider definition than the usual English translation,[117]

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[113] Ballara The origins of Ngāti Kahungunu, pp.504-505,515

[114] David Henige Oral Historiography London: Longman, 1982, pp.43,68-69; Jan Vansina Oral Tradition as History London: James Currey, 1985, pp.83,85

[115] Of the 98 licensed interpreters in 1888, only two had Māori surnames (Thomas George Poutawera and Mary Tautari), New Zealand Gazette 1888 (2), p.1424. Others with Pākehā surnames, such as James Carroll (ibid. 1874, p.491) and Louisa E Takiora Dalton (ibid. 1878 (2), p.1435) were at least part Māori, but the vast majority of interpreters seem to have been Pākehā males.

[116] See pages 114-115 *supra*.

[117] In this case 'matua' is usually translated 'parent', although it can actually refer to any relative of one's parents' generation, and thus covers the English words 'parent', 'uncle', 'aunt', and even 'cousin'.

are often left untranslated in the Wairarapa minute books, 'whānau' almost always occurs only where a whole Māori phrase has been recorded verbatim. Part of the cross-examination of Hōhepa Aporo was transcribed in the following way:

> My boundaries at Te Urunga o Pahau on the banks of the Ruamahanga it is a rua tuna e rakau. Don't know what tree it is. Have not seen this rua but know the place no te Popoki ratou ki aua whanau te takiwa o taua rakau. Ngatirakairangi are the only hapu who I know of who take eels from that rua.[118]

This type of pidgin, with Māori phrases being slotted into an English grammatical structure, is common in a number of minute books.

The term 'family' was much more widely used in Court records from most areas, but the scope of the term is often unclear. Its most common English usage usually refers to two generations, comprising parents and children (and maybe one set of grandparents). In contrast a whānau may consist of up to four generations and encompass more than one line of descent, so that cousins and second cousins are included in the same whānau. The distinction is of direct relevance to the subject of resource rights because the whānau typically includes people who do not follow a single line of descent.

Sometimes it is possible to determine from context what 'family' means in a given situation. When Reneti Tapa said his family's fighting pā was at Tuke-a-Māui,[119] family was meant in a wider sense, as pā were generally used by a large kin group and Tuke-a-Māui was a noted pā. Wīremu Kiriwehi's application to have relative interests determined on the Whakaihuwaka block stated that: "I claim that in accordance with Maori Custom I & my family sh^{d} be included in the list of owners." Further on in his case he elaborated, claiming for himself, his descendants (four children and a grandchild), and his sister, making up a small extended family by Māori standards.[120] In another Whanganui case, Hoani Tumango listed places on the Kaitangata block: "Tau Tau wai. Uruhau's family caught eels here & Tika's family. Mawhiti-whiti. Te Roa & family worked there, they got hinau birds & eels." In this case 'family' was clearly meant to refer to 'the descendants and/or household of the individual named', because

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[118] Tipua Mapunatea, 24/10/1888, Wairarapa MB 9 p.454. This paragraph could be translated as, "My boundaries are at Te Urunga o Pahau on the banks of the Ruamāhanga it is an eel hole [and] a tree. Don't know what tree it is. Have not seen this hole but know the place; they are of Popoki, the area around that tree is that family's. Ngāti Rakairangi are the only hapū who I know of who take eels from that hole."

[119] Pukenui, 6/2/1879, Whanganui MB 2 p.218

[120] Whakaihuwaka Relative Interests, 12/2/1898, Whanganui MB 36 pp.313-314

whakapapa given elsewhere showed these three to be brothers. Yet Hoani Tumango was at pains to differentiate between them and their resource rights, and throughout his evidence distinguished between areas used by one or two individuals, by "families", and by "all Ngaṭi Hinearo".[121] Such clarity is however unusual, and the diversity of usage in the examples given, all drawn from one area, demonstrates the need to pay careful attention to the details of cases to enable clues to be found and meanings reconstructed from the often imprecise English translations.

Another area which poses particular problems in translation from spoken Māori evidence to written English records is the whole area of property rights. The extent of Māori property rights over both land and resource rights was a sensitive political topic in the mid to late nineteenth century. Native Land Court judges in particular tended to see fishing rights as a supplement to land ownership and occupation rights, and as a result they did not see 'ownership' of fisheries as equal to 'ownership' of land. Even in cases such as the Tipua Mapunatea investigation in Wairarapa, where the only value in the land lay in its fisheries, Judge Alexander Mackay always sought to determine the ownership of the block through criteria such as residence on the land, ignoring the overwhelming evidence that suggested all rights to the area as a whole came from the exercising of fishing rights.[122]

The political significance of the property rights issue was complicated by genuine difficulties in translation, with the subtleties of Māori and English possessive grammatical structures being very difficult to translate accurately into the other language. Māori statements in the Court concerning property rights, especially their property rights in fisheries and other resources, show signs of having been translated into stock phrases. In many cases short passages of the minute books use the language of both usage or occupation rights, and ownership rights, interchangeably and without any clear indications as to what was implied by either. Despite the undoubted skills of Native Land Court translators, the deep cultural divide between Māori and Pākehā on the subject of property rights and concepts makes it difficult to determine Māori usages and underlying concepts from the English-language minute books.[123] Overall, however,

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[121] Kaitangata, 7/5/1895, Whanganui MB 25 pp.32-40

[122] See pages 82-85 *supra*, pages 257-258 *infra*.

[123] The question of Māori concepts of property and property rights is as much a linguistic issue as an historical one, and would require a detailed examination of nineteenth century Māori texts from a linguistic perspective. Given the experience of the Native Land Court interpreters, whose living and working environment was largely Māori-speaking, the Court minute books are probably the best English-language source for nineteenth century property rights. Expressions of property rights in late twentieth century Māori, which are couched in terms such

fishing rights were most commonly described in terms of "occupation" or "use" when referring to personal rights or the rights of small groups such as whānau. The rights of hapū, especially the larger hapū and groups of related hapū, were more usually described as "ownership" rights. When words such as "ownership" were used, it is often clear from the context that Māori intended to declare their ultimate rights under Māori tenure, not English-style rights of ownership such as alienation rights and exclusive individual title.[124]

Dealing with oral sources (in this case, the transcription of Court evidence) has its own peculiar difficulties. The tendency has been for literate societies to dismiss oral testimony out of hand as unreliable and tainted, but in recent years it has been recognized that oral testimony is a valid and valuable source for the historian of both oral and literate societies, offering useful evidence so long as its limitations are recognized and allowed for (as with any other source).[125] Many nineteenth century Land Court judges exhibited a distaste for making decisions on the basis of 'unsubstantiated' statements (that is, those not supported by external evidence, preferably written). Such sentiments were expressed by Chief Judge Seth-Smith in the Omahu hearing of 1891, when he said, "the Court must receive and weigh evidence of the traditional reports that have been orally transmitted from one generation to another. Such evidence is from its nature necessarily unsatisfactory." He believed that disputed traditions were of no authority, and preferred any one unequivocal act of ownership against any amount of "traditionary lore" or "excursions into the myths and traditions of so-called Maori history" attesting to the contrary.[126] Judges also preferred to hear the history of a block presented chronologically, in accord with

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as *tino rangatiratanga* and *mana whenua*, are considered by some modern commentators to be different in nature and context from mid-nineteenth century statements, and cannot be applied automatically by extension to nineteenth century concepts. See for example pages 7-8 *supra*.

[124] See Chapters Seven and Eight Property Rights in the Taupō/Whanganui Fishery.

[125] Many historians have considered the problems of oral history in recent years, especially the oral history of non-literate societies. Jan Vansina and David Henige have both dealt comprehensively with the processes of gathering and using oral evidence, but they have both specialized in working with living informants from modern orally-based societies, mostly in Africa. In contrast, Māori evidence in the Native Land Court is now several generations old and has been strongly influenced by the involvement of another culture in the process of transcription. Nevertheless, most of their principles are still relevant to the use of such pre-recorded oral material; and many New Zealand historians have also dealt with issues relating particularly to the use of Māori oral tradition as an historical source.

[126] Smith Native Custom and Law, pp.51-52; Jackson, p.39

contemporary European historical practice. They had difficulty following the more thematic, relationship-based Māori approach.[127]

This is not to say that oral testimony can be accepted without being subjected to the normal critical rigours employed by the historian. A major problem with using oral testimony, especially that originating from people now passed away, is that by its nature it is very difficult to corroborate. There are generally no contemporary written sources to check oral traditions against (although such putative sources would not necessarily be any less partial than oral material), which makes it important to draw on material from other disciplines, such as ethnography, anthropology, and archaeology, to help to support one's hypotheses.[128]

D.R. Simmons produced some guidelines for the evaluation of Māori tradition, such as choosing informants with a good reputation in the tribe and a wide range of knowledge, checking for the absence of obviously introduced material into the tradition (such as the inclusion of biblical figures like Noah into whakapapa), and relying on widely known and durable versions rather than those told by only one informant.[129] Many of these points apply more particularly to early, mythologized tradition, rather than to lower-level discussions of recent history and rights. Nevertheless, it is often clear from Court evidence that some witnesses were better-informed than others, and some also had more skill than others in presenting their information cogently.

One major area of difference between written and oral sources is in the effects of time on the material. While written material may lie hidden for centuries before being subject to historical analysis and interpretation, oral history requires transmission from generation to generation, and with each re-telling comes the opportunity for abbreviation, re-interpretation, and re-organization on the part of the person transmitting the information, be it conscious or unintentional. This is countered in part by the involvement of the wider community in the transmission of information, as the history is group property and the ability of a single person to make radical changes is constrained by group knowledge. Without external corroboration, it is impossible to tell exactly how these processes have acted upon the material — all that can be said is that the

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[127] Ballara The origins of Ngāti Kahungunu, p.539; Judith Binney 'Maori Oral Narratives, Pakeha Written Texts: Two Forms of Telling History' NZJH 21 (1987): 16-28, pp.18,21; Salmond, p.318

[128] Te Rangi Hiroa 'The Value of Tradition', p.189; Vansina, pp.159,172,190,197

[129] D.R. Simmons The Great New Zealand Myth. A study of the discovery and origin traditions of the Maori Wellington: A.H. & A.W. Reed, 1976, pp.8-12. See also J. Prytz Johansen The Maori and his Religion in its Non-ritualistic Aspects Copenhagen: I Kommission Hos Ejnar Munksgaard, 1954, pp.270-283

form taken by the information will often be more reflective of the generation which is doing the re-telling than of that which originally generated the material.

Reinterpretation over time is an inevitable process in any form of history, from the dry disputation of academic minutiae to orally transmitted scandals concerning historical figures.[130] Each will be couched in terms familiar to those for whom it was intended, and may unconsciously also be cast as a justification for the present situation. The problem with reinterpretation of oral traditions is that the earlier interpretations, and thus the deviations from the original, may no longer be accessible.[131] Even where variant forms of a tradition exist, unless there is an obvious source of contamination one cannot say if one is closer to the original than the other, or whether they have just changed differently in the re-telling. For this reason, traditions passed over three or four generations will generally be much more reliable than those going back, say, fifteen generations, simply because there has been much less time for changes to be introduced into the material or for details to have been lost.[132] There is also a risk that in the case of the Native Land Court evidence, this tendency to rephrase things in contemporary forms may give a picture of resource rights such as fishing which implies that the ways in which rights were exercised was static over time, as earlier usages may have been lost from the collective memory. However, as evidence for fishing rights usually goes back only a few generations from the time of the Court hearings, this process is unlikely to have had a significant impact on the evidence.

An important factor in the selection process is that only that which seems relevant to the present, at each step of the transmission, is passed on to the next generation. The pattern of the past tends to be reshaped with each re-telling to fit present concerns. Thus much of what is of value to outsider observers, with their vastly different interests and perspectives, is no longer extant. Particularly vulnerable to loss are details concerning family lines which have died out and aspects of socio-political structures which have become irrelevant, as there ceases to be any good reason to remember or transmit this information.[133]

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[130] Binney, pp.16-17

[131] Jackson, p.40; Henige Oral Historiography, p.3; Vansina, pp.17-19,106,190

[132] Vansina, pp.172,190

[133] Binney, p.25; P.M. Mercer 'Oral tradition in the Pacific: problems of interpretation' Journal of Pacific History 14 (1979): 130-153, p.145; Vansina, pp.106,119,167-168,190

As with written history, there are occasions when the reworkings are deliberate and seek to hide or distort for political reasons. Accounts of battles or other disputes and genealogical information are particularly subject to this process, although whakapapa at least does allow the possibility of finding common ground through the cross-checking of a number of different lines. In the absence of external evidence these multiple expressions of reality must be accepted, and the consistencies sought, as each descent group will hold onto the traditions it believes to be true for itself.[134] There were certain prohibitions in Māori society related to deliberate tampering with the sacred texts, as it was believed that to make mistakes in the recitation of such strongly tapu material would bring down the wrath of the gods.[135] This however related mostly to esoteric material which we would now call myth rather than tribal history. The Native Land Court process exacerbated the problem of reworking, as it was a highly confrontational environment with little place for what might be regarded as a balanced discussion of the issues, given the high stakes involved.

Even if material was not deliberately manipulated or doctored, people almost invariably (and naturally) tended to give accounts in their own best interests and for their own reasons. In Māori society, where the individual identified so strongly with the kin group, this meant that history was invariably iwi, hapū, or whānau based, and structured accordingly. It gave preference to the interests of the kin group and attempted to validate its claims. It also dealt with the topics that the kin group or individuals themselves found important, giving an indication of their priorities and preoccupations. This does not necessarily answer the questions which later observers might wish to ask, especially where they approach the subject from a different cultural viewpoint.[136] Even in the Court cases, where there was an external structure imposed on those giving evidence, some people (usually elderly men) talked at great length concerning subjects which seem, to the modern reader, to have little or no relevance to the case in hand, but obviously these people themselves considered the information to be greatly important to the case.

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[134] David Henige The Chronology of Oral Tradition Oxford: Oxford University Press, 1974, pp.38,41,55; Salmond, p.319; Vansina, p.24

[135] Te Rangi Hiroa 'The Value of Tradition', p.186; Best The Maori School of Learning, p.6

[136] Binney, pp.18,24-25,27; Salmond, p.319; Vansina, pp.19,197

Traditional Māori society had an established transmission process for history, especially very early mythologized history, in the form of the *whare wānanga.* This included tribal history in the curriculum taught to its chiefly pupils. In Māori society, knowledge is not a freely available commodity and access to this tapu material was strictly controlled by the *whare wānanga* process, as only those regarded as fit pupils were admitted.[137] However, the arrival of the Pākehā radically changed the ways in which history was transmitted by Māori. The influence of the missionaries undermined the *whare wānanga*, where teaching concentrated on pre-Christian religious rituals and the arts of *mākutu.* Many communities were also badly hit by introduced disease and social dislocation, with the consequent loss of community facilities like the *whare wānanga.* However, the influence of Christianity did not completely destroy traditional religious practices in the short term, and the secular aspects of traditional education might have been expected to survive longer than the religious. Elsdon Best knew of four *whare wānanga* experts still alive in 1914,[138] but even so, it is likely that by the mid-nineteenth century full *whare wānanga* training was less common than it had been earlier.

Thus by the time the Land Court investigated the bulk of lands in many districts in the later part of the nineteenth century, many kaumātua had not had the same degree of formal training as their forefathers. When coupled with the formidable mortality rates for Māori in that period, this meant that much historical information was poorly disseminated in those few decades. There were simply not enough knowledgeable kaumātua still alive to teach the young people the full significance of their hapū history, although the rapid and widespread adoption of literacy and its use to preserve traditional history (including *whare wānanga* teachings)[139] in an enduring form did help to counter this tendency. During this period, Pākehā scholars such as George Grey, John White and Percy Smith also began to collect and publish Māori history, which had the effect of synthesizing and freezing Māori tradition. It also created feedback from standardized versions, particularly of very early history.[140]

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[137] Hanson and Hanson pp.58-60; Makereti, pp.152-154; Te Uira Manihera, Ngoi Pewhairangi and John Rangihau 'Learning and Tapu' in Michael King (ed.) Te Ao Hurihuri: Aspects of Maoritanga 2nd ed. Auckland: Reed Books, 1992, pp.9-14; 'Lectures on Maori Customs and Superstitions, Delivered in the Mechanics' Institute, Auckland, by John White, Esq.' AJHR 1861 E-7, pp.14,41; Best The Maori School of Learning, pp.6,11

[138] Best The Maori School of Learning, p.22

[139] ibid. p.21

[140] Henige The Chronology of Oral Tradition, pp.86,96,102; Jackson, p.40

There may also be a problem with the information offered by particularly elderly witnesses, as contrary to popular belief, the elderly are not inevitably the best informants on the past. They often exhibit a tendency to idealize the past, especially in a period of obvious decline (what might be called the 'youth of today' syndrome), and apart from that there are all the attendant problems of old age and progressive memory loss.[141] While Māori life expectancy was generally quite low in the nineteenth century, some Land Court witnesses were in their seventies and eighties. On some occasions people in the Court actually implied that others giving evidence were senile, even where they were technically of the same party. This may have been an attempt to discredit the witness for reasons now unknown, or may have been put forward to account for embarrassing discrepancies in evidence given by different members of the same party.[142] In any case, many elderly witnesses would never have had a broad knowledge of tribal history and whakapapa, as information was not taught to all but tended to be confined to those members of certain families who showed a facility for learning.[143]

Once again, it must be emphasized that while oral history has its limitations, they do not impose insurmountable restraints. The problems may at times seem to invalidate much of the material, but they must be placed in context. All historical writing is an investigation of a hypothesis, not a definitive answer, whatever the sources. The aim is to wring as much as possible from the material available. In the case of the intangible aspects of traditional Māori society, the Native Land Court records will probably be by far the most important written source consulted. They cannot be matched for breadth of range and detail, and have the additional advantage of what was said by Māori themselves, not the opinions of 'experts' from an alien culture.

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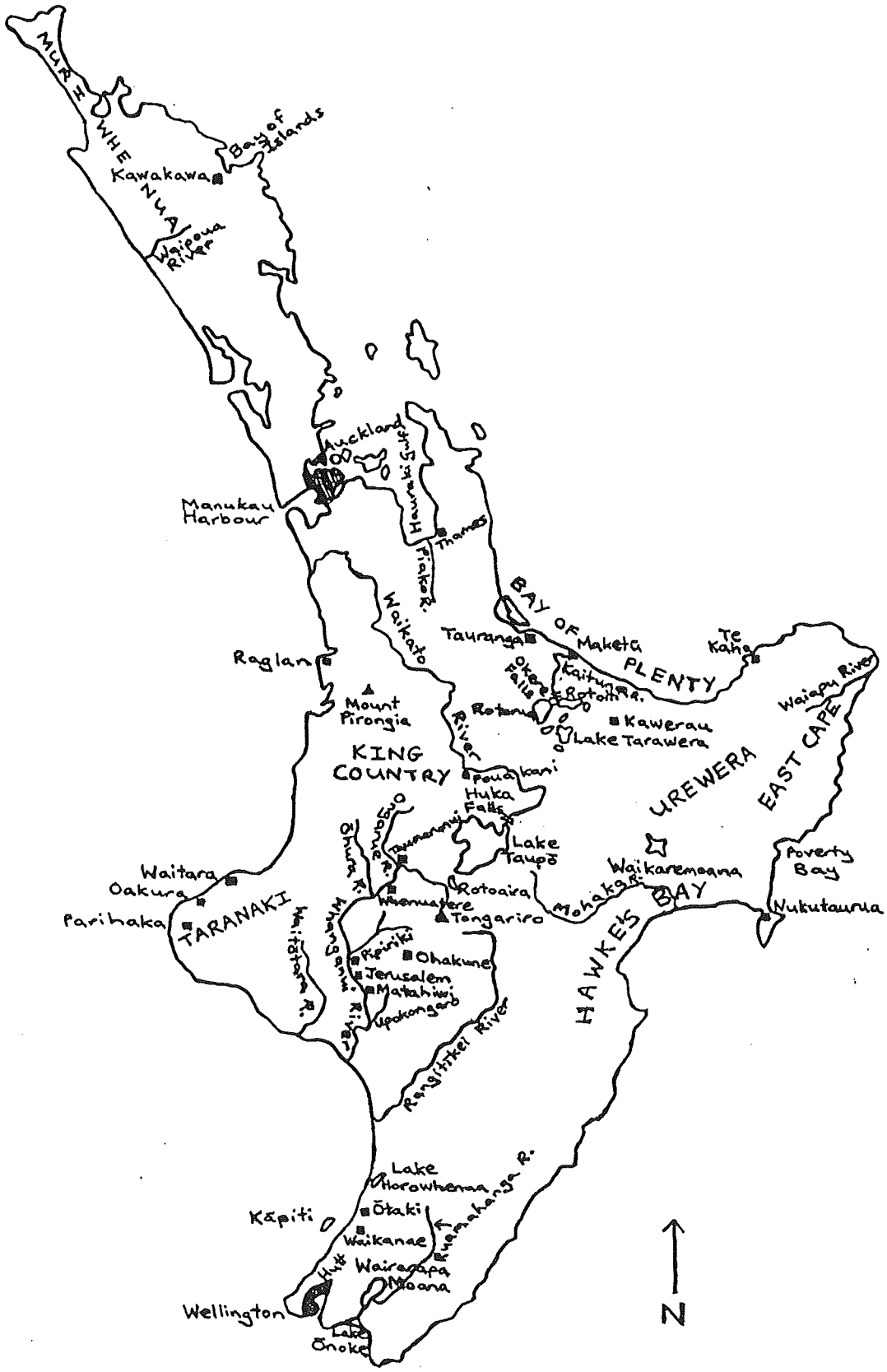
[141] Henige Oral Historiography, p.46

[142] See for example Rangiwakateka, Tawhitinui, 23/7/1900, Whanganui MB 46 p.4

[143] Best The Maori School of Learning, pp.14-15

Map 1 a) **North Island — places mentioned in Part One**



CHAPTER FOUR

Customary Māori Freshwater Fishing Practices — An Overview

He wai Tangaroa i whano ai ki uta
(By means of water does Tangaroa travel inland)

While the focus of this thesis is on customary Māori fishing rights rather than fishing practices, an understanding of those practices can provide further illumination of the workings of rights. Fishing rights are not an abstract notion, but involve people with rights going out and catching fish. The successful exercise of a right requires a knowledge of species, habitat, seasonal fluctuations and capture methods. Capture methods in particular both influence and are influenced by fishing rights, as the size of the group entitled to use a resource would be related to the method used to utilize it. Also, many Pākehā writers have discussed traditional Māori fishing practices, but comprehensive discussion of fishing rights was rare until recent times. The reverse is true of the Native Land Court, where Māori witnesses gave very few details of fishing practices (there was no need to explain fishing practices in a forum where most of the participants implicitly understood what was involved), but did discuss fishing rights. It is intended that this overview of fishing practices will provide a useful context for the case studies which follow in the second part of this thesis.

While those case studies are drawn from only three North Island regions, this chapter explores evidence for traditional fishing practices from around the whole country, including the South Island. Most of the literature concerned with fishing rights looks at the country as a whole and does not seek to examine regional or tribal variations, and that research dealing with regional fishing rights (*e.g.* the Waitangi Tribunal's Muriwhenua Fishing, Ngāi Tahu and Motunui-Waitara Reports, amongst others) does not relate directly to the areas considered in the case studies. Whilst there were variations in fishing practices and rights from area to area, there were also considerable similarities, especially in the exploitation of particular species in comparable environments. Material from the South Island has been included for this reason. Despite the substantial differences in social organization in the South Island resulting from a much lower population density and cooler climate, which precluded large-scale horticulture, Māori fishing

practices there were not greatly dissimilar to those of the North Island, and these fisheries have been well represented in both modern and past research on fishing practices and rights.

Fish and other freshwater foods were one of the most important food sources for pre-contact Māori, whose other sources of animal protein were limited to birds and *kiore* (Polynesian rats) after the demise of the moa and near-extinction of the fur seal in the early centuries of Māori settlement. The more widespread freshwater species, such as the eel and the various whitebait species, were valuable to most communities by virtue of their ubiquity. While there was usually some type of fish available fresh at any given time of the year, large seasonal runs of freshwater species gave Māori the opportunity to capture and preserve large numbers for both winter subsistence and wider distribution, be that through *manaakitanga* (hospitality) shown to visitors or through exchanging surplus resources for goods found elsewhere.

Due to variations in geography and climate, available species varied around the country, as did their relative importance. For example, while eels abounded throughout most river systems and formed an important part of the resource base in those areas, eels were barred from entering the Lake Taupō catchment by the ferocity of the Huka Falls, on the upper Waikato River near the lake entrance, so that the only fish in the lake were land-locked populations of various small species. Thus differing approaches to fishing were necessary in the two areas. The relative importance of different food sources also governed the amount of labour and effort devoted to their capture. Important and reliable food sources warranted the expenditure of a great deal of labour, as can be seen from the considerable engineering feat of the canal networks of the Wairau Lagoon, in Marlborough, and the lamprey and eel weirs of the Whanganui River, which were built solidly enough to last for generations and survive serious floods if sufficient annual maintenance was undertaken. At the other end of the scale was the opportunistic capture of any passing fish by a hungry hunter or traveller. Both these forms of exploitation were important facets of Māori fishing practices.

As with all aspects of the traditional Māori lifestyle, there was a strong spiritual element to fishing practices, which manifested itself in a number of ways. In any community there would be tohunga whose field of expertise was fishing and its associated rituals. *Karakia* were often used to invoke the aid of the gods and ensure good fishing, as well as to seek permission to take the fish. The spiritual aspect could also manifest itself in the power of chiefs to declare a *rāhui*, or closed season, over any fishing resource under his control. This could be a pragmatic decision, made to protect the resource from damage by over-exploitation, or to prevent

spiritual pollution caused by taking and eating fish from an area where someone had drowned. The declaration of a *rāhui* was also an expression of the temporal and spiritual authority of the chief who did so. However, such questions of spiritual authority and beliefs are beyond the experience of this writer and the scope of this work, which intends to concentrate upon the material aspects of fishing rights and to leave spiritual questions to those competent to deal with them.

The written sources concerning traditional Māori freshwater fishing practices are dominated by Pākehā ethnologists of the early part of the twentieth century. Elsdon Best's Fishing Methods and Devices of the Maori,[1] first published in 1929, has come to be regarded as the standard work on Māori fishing practices, even though Best himself had considerable misgivings about his work, claiming it to be "a dashed bad paper — utterly inadequate — but I know nought about fishing", containing as it did much second-hand information.[2] Certainly it drew heavily from a 1923 Dominion Museum field trip to the East Coast, where Apirana Ngata had encouraged the revival of traditional technologies, and from Best's contacts with the Tūhoe people of the Urewera around the turn of the century. Neither of these areas could be said to contain typical freshwater fisheries, but Best did seek to balance this with material gleaned from Māori of other tribes and areas.[3] He also gave roughly equal coverage to both marine and freshwater fisheries, unlike most other writers who concentrated on one or the other. Much of Fishing Methods and Devices of the Maori is concerned with the construction and terminology of the fishing devices in question, and spiritual aspects of fishing, rather than the actual process of fishing, but descriptions are given of the methods of capture of most freshwater species. Good general descriptions were also given in a number of his more wide-ranging ethnological works.[4]

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1 Elsdon Best Fishing Methods and Devices of the Maori Wellington: Dominion Museum, 1929

2 E.W.G. Craig Man of the Mist: a biography of Elsdon Best Wellington: A.H. & A.W. Reed, 1964, p.220

3 Craig, pp.60,188-189; Best Fishing Methods, Appendices 1-23, pp.230-250, where the written information given to Best by various Māori informants is printed in the original Māori. The 1923 Museum visit gave rise to another important work on traditional Māori fishing — Te Rangi Hiroa 'The Maori Craft of Netting' TPNZI 56 (1925): 597-646

4 See especially 'Food Products of Tuhoeland: being Notes on the Food-supplies of a Non-agricultural Tribe of the Natives of New Zealand; together with some Account of various Customs, Superstitions, &c., pertaining to Foods' TPNZI 35 (1902): 45-111; The Maori Vol. II Wellington: Board of Maori Ethnological Research, 1924; The Maori as he was Wellington: Government Printer, 1924

No other writer achieved the coverage of the subject that Best did, but others managed to give comprehensive accounts of practices in specific areas or for particular species. Herries Beattie gathered information on most aspects of the traditional Māori lifestyle of the South Island, much of which was recorded as part of an ethnological field project, covering the area from North Canterbury southwards, undertaken by the Otago University Museum in 1920. However, most of this was not compiled and published until 1994. Traditional Lifeways of the Southern Maori contains full descriptions of freshwater fisheries in Canterbury, Otago, and Southland, using information derived from kaumātua throughout the island.[5]

In the North Island, local historian T.W. Downes observed fishing practices on the Whanganui River, especially those related to the eel and the huge eel weirs of the river, and considerable attention was paid to Māori fishing practices on the river when the ownership of the bed was considered by a Royal Commission in 1950.[6] Likewise, the Wairarapa Lakes Commission of Enquiry heard evidence on fishing practices in Wairarapa Moana when investigating those lakes in 1891.[7] A number of observers wrote concerning fisheries in Lake Taupō, including H.J. Fletcher and John Grace (who belonged to the local iwi Ngāti Tūwharetoa).[8] The Rotorua Lakes fisheries were written about by Te Rangi Hiroa (Sir Peter Buck) and Makereti Papakura.[9] Ichthyologists and other scientists have often also considered Māori capture of native species alongside the biology of the fish. In particular, R.M. McDowall's work New Zealand Freshwater Fishes — a natural history and guide considers Māori involvement with each native species, and

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5 James Herries Beattie (ed. Atholl Anderson) Traditional Lifeways of the Southern Maori Dunedin: University of Otago Press, 1994, *passim.*

6 T.W. Downes 'Notes on Eels and Eel-Weirs' TPNZI 50 (1917): 296-316; T.W. Downes History of and Guide to the Wanganui River Wanganui: Wanganui Herald Newspaper Company, 1921; 'Report of Royal Commission Appointed to Inquire into and Report on Claims made by Certain Maoris in Respect of the Wanganui River' AJHR 1950 G-2; Proceedings of the Royal Commission in Respect of Claims to the Wanganui River' Maori Affairs Dept file MA 100/1, National Archives

7 'Claims of Natives to Wairarapa Lakes and Adjacent Lands — Report of Mr. Commissioner Mackay' AJHR 1891 G-4

8 H.J. Fletcher 'The Edible Fish, &c., of Taupo-nui-a-Tia' TPNZI 51 (1918): 259-264; John Te H. Grace Tuwharetoa — The History of the Maori People of the Taupo District Auckland: Reed Books, 1959

9 Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua' TPNZI 53 (1921): 433-451; Makereti [Papakura] The Old-Time Maori Auckland: New Women's Press, 1986. Te Rangi Hiroa was a noted anthropologist and Polynesia expert, becoming director of the Bishop Museum in Hawai'i, while Makereti Papakura's work was produced for an anthropology degree at Oxford University.

gives an overview of traditional Māori management and exploitation of the fishery resource.[10] This consolidates the work of earlier scientists such as W.J. Phillipps, who often gathered traditional knowledge to supplement their interest in the biology of lesser-known species.[11]

As well as those Māori working and writing within a Pākehā academic framework, such as Te Rangi Hiroa and Makereti Papakura, other kaumātua shared their own personal knowledge and expertise, often through the medium of Pākehā writers. Much information concerning Canterbury fisheries was sourced from Hōri Kerei Taiaroa and Teone Taare Tikao, whose knowledge was systematized by Herries Beattie and Elsdon Best.[12] In 1919, Tamati R. Poata wrote a volume entitled The Maori as a Fisherman and his Methods, dealing mostly with sea-fishing in the Te Kaha area, a rare example of Māori discussion in print of traditional fishing practices without the interpretation of Western scholarship.[13]

Unfortunately, little but the most basic information can be obtained from the records of the Native Land Court concerning actual fishing practices, as there was little need to discuss in detail practices which were well known to all parties. The concentration of the Court was also on site-specific fisheries, connected to a particular piece of land, rather than on typical fishery practices in any area. In recent times, much more material concerning Māori fisheries has been published, especially in connection with Waitangi Tribunal cases or other Māori claims, but much of this is either derived from earlier work, or deals with surviving traditional fisheries based on customary rights but utilizing modified equipment and practices. Nevertheless, the report of the Waitangi Tribunal on the Muriwhenua fishing claim, and much of the evidence submitted to the Tribunal in the Ngāi Tahu case (especially the work of fisheries scientist Dr George Habib), contains valuable discussion of traditional freshwater fishing practices.[14]

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10 R.M. McDowall New Zealand Freshwater Fishes — a natural history and guide Auckland: Heinemann Reed, 1990

11 See especially W.J. Phillipps 'The Koaro: New Zealand's Subterranean Fish' NZJST 7 (1924): 190-191; W.J. Phillipps 'Notes on the Fresh-water Fish Papanoko' NZJST 11 (1929): 166-168

12 Teone Taare Tikao, told to Herries Beattie Tikao Talks — Ka Taoka o te Ao Kohatu Auckland: Penguin Books, 1990; Best Fishing Methods, pp.241-246; H.K. Taiaroa 'Account on Gathering Eels', 'Account on Gathering Flounder', and 'Account on Gathering Whitebait', in Polynesian Society Papers, MS 1187:208, Alexander Turnbull Library (translations into English in Ngai Tahu Claim Wai 27 Doc. #S-3 no. 37)

13 Tamati R. Poata The Maori as a Fisherman and his Methods Opotiki: Scott, 1919

14 Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) Wellington: The Waitangi Tribunal, 1988, pp.31-35,41-45; Muriwhenua Fishing Claim Wai 22 Docs #C-1, D-1; Waitangi Tribunal Ngai Tahu Report 1991 (Wai 27) Wellington: Brooker and Friend, 1991, pp.151-159,188-202,843-

Freshwater food species

The taxonomy of New Zealand freshwater fish species has confused both Māori and pākehā until relatively recently, with scientific classification not being clearly defined until the 1960s.[15] It is now established that there are some 27 recorded freshwater fish species native to New Zealand, some of which are now extinct or endangered, as well as a few other predominantly marine species which are diadromous, entering fresh water bodies such as estuaries and the lower reaches of rivers at certain stages.[16] Māori had a much wider range of names for the fish species that they encountered, with different descriptions applied to fish according to the stage in the life cycle, colour variations, size, and location, as well as dialectical variations from region to region. The ethnologist Elsdon Best collected 284 different Māori freshwater fish names from around the North Island, including 153 referring to eels alone, while the ichthyologist W.J. Phillipps listed about 300 different names for freshwater fish, drawn from around the country.[17] Even within regions, numerous variations were recognized. Kaumātua in the Whanganui area in the 1930s could name 53 different types of eels, while Ngāi Tahu in Canterbury distinguish 30 main types of eels and over 200 variations within those main groups.[18] Such thorough distinctions indicate an intimate familiarity with this important food source and its habitat, and suggest a sophisticated pattern of resource exploitation.

Not all the native species were known to Māori, or were distinguished from other more common and near-identical species.[19] Those which were known were all used as a food source in at least one part of the country. By far the most important freshwater fish was the eel (tuna), being almost universally distributed, easily caught, and nutritious. Other important if less widely distributed species include the lamprey (piharau, korokoro, or kanakana), kōkopu, kōaro, inanga,

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856,863-870,874-883; Waitangi Tribunal Ngai Tahu Sea Fisheries Report 1992 (Wai 27) Wellington: Brooker and Friend, 1992, pp.9-15; Ngai Tahu Claim Wai 27 Doc. #T-4

15 R.M. McDowall The New Zealand Whitebait Book Wellington: A.H. & A.W. Reed, 1984, p.84

16 McDowall NZ Freshwater Fishes, p.10

17 Best Fishing Methods, pp.95-100,199-201; W.J. Phillipps 'A List of Maori Fish Names' JPS 56 (1947): 41-51

18 Anonymous 'Access courses seek to preserve traditional fishing skills' Whanganui River Annual 1990:39; Anake Goodall Ko Waitaki te Awa, ka Roimata na Aoraki i Riringi Wellington: Aoraki Press, 1992, p.75

19 McDowall NZ Freshwater Fishes, pp.408,414

smelt (pōrohe or paraki), grayling (upokororo), bullies (toitoi) and river flounder (pātiki). There were a few other species which were not widely spread but which were taken in a few areas, such as the torrentfish (papanoko) and the mudfish (hauhau). Kōura (freshwater crayfish) and kākahi (freshwater mussels), while not strictly fish, were both found over much of the country and utilized as part of the freshwater fishery resource, as were marine species such as kahawai and mullet (aua and kanae) which moved into river mouths and estuaries at certain times.

The freshwater eel (generic Māori name tuna) falls into two species, the longfinned and shortfinned (the scientific names being *Anguilla dieffenbachii* and *A. australis* respectively). The young eels, born at sea, come into fresh waters as glass eels, and live in the estuary area for some time while developing into elvers, or tunariki.[20] They then migrate slowly upstream in shoals, moving throughout the country into almost any available waterway. The elvers can climb waterfalls and dam faces, up to 40 metres in some cases, and can work through the gravel in swift rapids. Eels can even be found in seemingly landlocked pools because of their ability to live out of water for some time, enabling them to move over damp surfaces such as wet grass or rocks to reach other bodies of water. They cannot, however, traverse such swift rapids as the Huka Falls below Lake Taupō, the Okere Falls below Rotorua and Rotoiti, or the Rangitata Gorge, and are so virtually unknown above these natural barriers.[21]

In general, the longfinned eel favours the faster waters of the stony-bedded inland rivers, but is found everywhere, while the short-finned eel prefers lowland lakes and creeks. The shortfins sometimes hibernate in winter, especially in cooler parts of the country. Both species migrate to sea to spawn, and there die, the shortfins leaving in late summer and the longfins in autumn. The size of these migrations in past years is some indication of the vast numbers of eels found in New Zealand waters before the coming of the Pākehā impacted on their numbers — it is estimated that formerly about one million shortfins and four thousand longfins migrated annually from Lake Ellesmere (Waihora).[22] Eels are relatively long-lived, with most spending twenty or thirty years in fresh water before migration. In this time shortfinned eels grow to about one metre in length and can weigh up to 3.5 kg, while longfins, which migrate at an older age, can grow up

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[20] Downes History and Guide, p.19

[21] Letter from Secretary of Marine to T.A. Strichen, 12/1/1950, Marine Dept file M 1/7/5, N.A.; McDowall NZ Freshwater Fishes, pp.53-55; G. Stokell Fresh Water Fishes of New Zealand Christchurch: Simpson & Williams, 1955, pp.45-47

[22] McDowall NZ Freshwater Fishes, pp.50-51

to 2 m and weigh 20 kg. Giant eels which are occasionally caught at weights of up to 50 kg are invariably female longfins which have for some reason never migrated, and these can be up to 60 years old.[23]

Eels were an especially valuable food source in areas where other food, particularly meat, was not easily obtainable, such as the South Island high country and inland areas of the North Island.[24] Migrating eels, known most commonly to Māori as tunaheke or hao, or as silverbellies to Pākehā, were the favoured food variety because they were easy to catch in bulk, and also did not need to have the stomachs cleaned because migrating eels do not feed.[25] Eels also fulfilled a vital nutritional role, especially those eels dried for winter use which consisted of half protein and half oil, both scarce in the pre-contact diet. The importance of eels as a source of fat in particular was recognized even before modern scientific analysis of dietary needs.[26]

The lamprey (*Geotria australis*) is known by a number of different Māori names, including piharau (in the Whanganui area), korokoro (eastern North Island), and kanakana (South Island). It is found throughout the country, but it is not as common as the eel, which it is often mistaken for. The lamprey spawns in small, bush-covered streams, and the young lampreys then migrate to sea each winter. The fish spend most of their life at sea before returning during winter and spring to spawn, running mostly while river levels are high and nights dark. The migration can take them over 200 kilometres inland, with lampreys being found in the Whanganui catchment at Ongarue, above Taumarunui. They are able to use their powerful sucker mouths to pull themselves up rock faces and other obstructions, and can also move across damp ground like eels. Once the adult lampreys have spawned, they die.[27]

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[23] ibid. pp.48-51,56,59-64; Stokell, pp.45-49

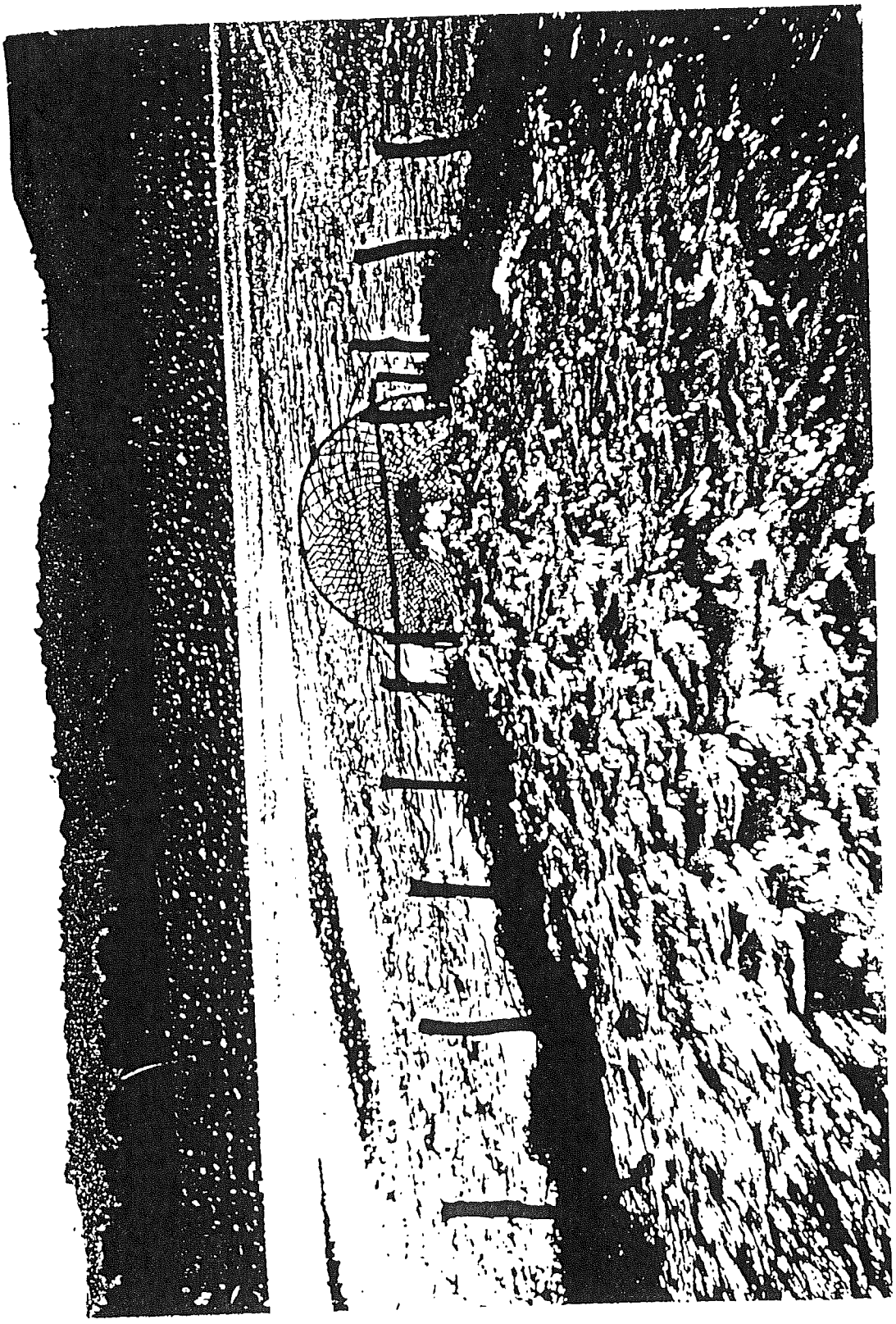
[24] Beattie Traditional Lifeways, p.141; Best The Maori as he was, p.259

[25] Wairarapa Lakes Commission Report, p.5; Beattie Traditional Lifeways, pp.144,317-318; G.D. Coates 'Management of the Wild Eel Fishery in New Zealand and the Whenau [sic] a Apanui Experiment in Eel Culture' in R.J. Walker (ed.) Report of the Seminar on Fisheries for Maori Leaders Auckland: Centre for Continuing Education, University of Auckland, 1976, p.3; Downes 'Notes on Eels and Eel-Weirs', pp.298-299; Gilbert Mair 'Notes on Fishes in Upper Whanganui River' TPNZI 12 (1879): 315-316, p.316; Yvonne Marshall 'Maori Mass Capture of Freshwater Eels: An Ethnoarchaeological Reconstruction of Prehistoric Subsistence and Social Behaviour' NZJA 9 (1987): 55-79, pp.57,66; Tikao, p.138

[26] J.C. Johnstone Maoria. A Sketch of the Manners and Customs of the Aboriginal Inhabitants of New Zealand London: Chapman & Hall, 1874, p.98; Marshall, pp.71-72; Charlotte Eliot Warburton The Wanganui River: The Rhine of New Zealand Palmerston North: Keeling & Mundy, 1965, p.86

[27] McDowall NZ Freshwater Fishes, pp.38-45; Stokell, p.9

Fig. 1 **Basic temporary *pā tuna* (eel weir), Waiapu River**
A basic travellers' eel weir constructed by the Dominion Museum party on a field trip to the East Cape, 1923
Photograph: J. McDonald, courtesy of National Museum of New Zealand Te Papa Tongarewa, Wellington, New Zealand.



Traditional Māori lamprey fisheries were concentrated in a few areas where substantial numbers of the fish could be readily caught as they went upstream in winter and spring, especially where they were slowed at waterfalls and the like. There were notable fisheries in the Mataura and Waikawa Rivers in Southland, particularly at the Mataura (formerly Te Aunui) Falls;[28] in the Whanganui River, especially at Pipiriki where they are still taken by traditional methods, albeit in greatly reduced numbers;[29] and in the Waitōtara River and elsewhere in Taranaki, where catches of several tons were recorded.[30] The lamprey was valued as a food source because of the high proportion of fat to body weight, and like the eel, it did not feed while running and so had the advantage of not requiring cleaning. It could also be risky eating, as toxic bile pigments accumulate in the skins of adult fish. The danger of a surfeit of lampreys was recorded by the Whanganui missionary Richard Taylor, who wrote in a discussion of freshwater food species, "So extremely fond are the natives of the lamprey, that deaths from overeating it are far from uncommon."[31]

The upokororo (*Prototroctes oxyrhynchus*, known wrongly to Pākehā as grayling) was another of the larger freshwater species. Little is known about this fish because it was becoming uncommon by the 1880s and has been presumed extinct since about the 1930s.[32] It was found, usually in shoals, all around the country in streams accessible from the sea, and further upstream in slower-moving rivers. It preferred clear waters with some forest cover so it is likely that a combination of deforestation and predation by trout accounted for its extinction. Another sea-migratory species, it came into fresh water to spawn at about the same time as the whitebait

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28 Atholl Anderson Te Puoho's Last Raid Dunedin: Otago Heritage Books, 1986, pp.37-39; Herries Beattie 'Nature-lore of the Southern Maori' TPNZI 52 (1920): 53-77, p.53; Herries Beattie Our Southernmost Maoris Dunedin: Otago Daily Times, 1954, p.61; Beattie Traditional Lifeways, pp.150-151; McDowall NZ Freshwater Fishes, pp.43,409

29 Evidence of Alfred Edward Davey, Wanganui River Commission Proceedings, p.2C.2; Best Fishing Methods, pp.189,192-193; Titapu Henare 'A fisherman's evidence' Whanganui River Annual 1990:38; Mair 'Notes on Fishes in Upper Whanganui River', p.316; Kathy Ombler The Wanganui River: a scenic, historic and wilderness experience Wanganui: Wanganui River Reserves Board, [1981], p.32; P.R. Todd 'Wanganui Lamprey Fishery' Catch 6(2) (1979): 19-20, p.20

30 Best Fishing Methods, p.189; W.J. Phillipps and E.R. Hodgkinson 'Further Notes on the Edible Fishes on New Zealand' NZJST 5 (1922): 91-97, p.97

31 Richard Taylor Te Ika a Maui, or New Zealand and its Inhabitants London: Wertheim and MacIntosh, 1855, p.383; McDowall NZ Freshwater Fishes, pp.42-43

32 McDowall NZ Freshwater Fishes, pp.80,85

run.[33] Well-known upokororo fisheries existed on the West Coast of the South Island,[34] in the Whanganui River, where it was also known as paneroro, in the Bay of Plenty and East Cape, and in the Wairau River where it was once caught by the cartload.[35] It was taken mostly in March and April, when the fish were fat and full of spawn, but it could also cause illness if eaten in too great a quantity at this time.[36] According to Thomas Brunner, they were caught earlier (December and January) in the West Coast rivers, and Brunner himself caught 50 "good-sized" upokororo at one sweep in the Buller.[37]

The name kōkopu is used to apply to a number of galaxiid species known collectively to Pākehā as native, Māori, or mountain trout. Most commonly it refers to the giant kōkopu (*Galaxias argenteus*) or the banded kōkopu (*G. fasciatus*), although the banded kōkopu is also known as the kopu or para in the eastern North Island, and as the kokopara (corrupted by Pākehā to cockabully) in the Whanganui and the South Island. In Lake Taupō and Rotorua the term kōkopu applies to a fish known elsewhere as the kōaro (*G. brevipinnis*), especially to its immature form.[38] The juvenile kōkopu (which forms part of the annual whitebait run along with the closely related species the inanga (*G. maculatus* or *G. attenuatus*) and kōaro) is known most

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33 ibid. pp.79-86,413; Best Fishing Methods, p.212; Stokell, pp.41-44

34 Atholl Anderson 'West Coast, South Island' in Nigel Prickett The First Thousand Years: Regional Perspectives in New Zealand Archaeology Palmerston North: The Dunmore Press, 1982, p.107; Thomas Brunner 'Journal of an Expedition to Explore the Interior of the Middle Island, New Zealand, 1846-8' in Nancy Taylor Early Travellers in New Zealand London: Oxford University Press, 1959, pp.265,293; McDowall NZ Freshwater Fishes, pp.81,408

35 Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.T.3; Downes 'Notes on Eels and Eel-Weirs', p.307; Mair 'Notes on Fishes in Upper Whanganui River', pp.315-316; Best Fishing Methods, p.213; Best 'Food Products of Tuhoeland', p.79; Te Rangi Hiroa 'The Maori Craft of Netting', p.636; McDowall NZ Freshwater Fishes, p.79

36 Best Fishing Methods, p.212; Raymond Firth Economics of the New Zealand Maori Wellington: Government Printer, 1959, p.75; Te Rangi Hiroa 'The Maori Craft of Netting', p.638

37 Brunner, pp.265,293

38 McDowall NZ Freshwater Fishes, pp.89,94,104,409,415; Beattie Traditional Lifeways, p.137; Best Fishing Methods, p.199; Downes 'Notes on Eels and Eel-Weirs', pp.306-307; James Hector 'Notes on the Edible Fishes' in F.W. Hutton Fishes of New Zealand Wellington: James Hughes, 1874, p.128; Te Rangi Hiroa 'The Maori Craft of Netting', p.640; Julie Ranginui 'The fish we were able to catch formed the major part of our diet' Whanganui River Annual 1990: 34-35, p.35; R.R. Strickland 'Pre-European transfer of Smelt in the Rotorua-Taupo area, New Zealand' JRSNZ 23 (1993): 13-28, p.23. John Grace, H.J. Fletcher and Gilbert Mair distinguished between populations of kōkopu and kōaro in Lake Taupō — see Grace, p.509; Fletcher, p.260; Gilbert Mair Reminiscences and Maori Stories Auckland: Brett, 1923, p.43

often as inanga, a term which was commonly used by Māori to apply to all the juvenile fish found in the whitebait run. [39] This use of the name kōkopu to refer to a variety of species and stages in the life cycle has caused a number of Pākehā writers on fisheries to confuse their species. For example Elsdon Best, usually careful with variant names, equated kōkopu in Rotorua with grayling,[40] although they are in fact two completely different species.

The giant kōkopu is found around the country, especially in swampy streams close to the sea, although it is now rare in many places. The banded kōkopu is found throughout the country also, but travels further inland. Areas in which they are particularly common include the lower Waikato, the Wairarapa, the West Coast, and Otago-Southland. They are sea-migratory, going to spawn in late autumn and early winter, with the young returning at the end of the whitebait run, but there are also land-locked populations, some of which appear to have been deliberately introduced. The giant kōkopu can grow up to 600 mm long and weigh up to 2 kg, but is more usually about half that size, while the banded kōkopu usually grows to about 200 mm and weighs up to 500 grams.[41] The kōkopu was an important food source for Māori, particularly before their numbers fell through loss of habitat and competition with trout.[42] Established fisheries are recorded in Lake Wairarapa, South Canterbury, the Urewera Ranges, and the Whanganui River.[43]

The kōaro (*Galaxias brevipinnis*) is also known in the Thermal Lakes (Taupō, Rotorua, and others on the Volcanic Plateau) as the kōkopu, to which it is closely related. They are also called maehe in Waikaremoana, and gudgeon by some earlier Pākehā writers. Juvenile kōaro are

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39 Pat Burstall 'The Introduction of Freshwater Fish into Rotorua Lakes' in Don Stafford, Joan Boyd, and Roger Steele Rotorua 1880-1890 Rotorua: H.A. Holmes, 1980, p.245; Grace, pp.511-512; McDowall The NZ Whitebait Book, pp.11-13; Strickland, pp.16,23

40 Best The Maori as he was, p.259

41 McDowall NZ Freshwater Fishes, pp.89-100; Herries Beattie Maori Place Names of Canterbury Dunedin: Otago Daily Times, 1945, p.63; W.J. Phillipps 'Additional Notes on New Zealand Fresh-water Fishes' NZJST 8 (1926): 289-298, p.293; Stokell, pp.27-32

42 Best The Maori Vol. II, p.447; McDowall NZ Freshwater Fishes, pp.414-415

43 Wairarapa Lakes Commission Report, p.19; Beattie Traditional Lifeways, pp.146-148; Best Fishing Methods, p.217; Best 'Food Products of Tuhoeland', pp.72-73; Downes 'Notes on Eels and Eel-Weirs', pp.306-307; Ranginui, p.34; Richard Taylor, p.382

generally known everywhere as inanga.[44] Māori usually used the name kōaro to refer more particularly to the isolated populations of the fish found in Rotoaira and Rotopounamu, but they are in fact the same fish as found in the larger lakes. The different land-locked populations are so varied in appearance that they were earlier regarded as separate species, so the discrepancies in terminology are not surprising.[45] The popular Pākehā name mountain trout reflects the kōaro's favoured habitat, in rocky, fast-flowing, forested streams and mountain lakes, sometimes above the bushline. A number of these lake populations appear to have been introduced by Māori.[46] Young kōaro are able to climb damp rock faces to negotiate waterfalls and the like, so as to migrate ever further inland. Land-locked populations exist in most of the Thermal Lakes and the South Island high country. There are also some coastal sea-migratory kōaro, which contribute to the whitebait run, especially on the West Coast. It can grow quite large, but is more usually 160-180 mm long.[47]

Before the introduction of trout into Lake Taupō, kōaro were extremely numerous there, so much so that in high winds they were washed up onto the shore in thousands and could be taken away by the cartload. They could also be caught in the lake all year round, either as the juvenile inanga or as adult kōaro. Their importance as a food source was even greater because the only other available food fish was the small toitoi, or bully.[48] The kōaro fishery in nearby Rotoaira was also an extremely valued one, so much so that Ngāti Tūwharetoa were compensated by the government when the stocks were badly damaged by trout. While some believed that the fish disappeared into underground streams around the lake in autumn, as they were not to be found from March to November, it seems more likely that they merely retreated to other streams

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[44] McDowall NZ Freshwater Fishes, p.415; Best Fishing Methods, p.201; Grace, pp.511-512; Hector, p.129; W.J. Phillipps 'Notes on the Edible Fishes of New Zealand. With a Record of Fishes exposed for sale in Wellington during 1918' NZJST 4 (1921): 114-125, p.119; Strickland, p.18

[45] Stokell for example gives three different species (*G. lynx* in the Southern Lakes, *G. koaro* in the Thermal District, and *G. brevipinnis* around the coast) for what is now regarded as *G. brevipinnis*. Stokell, pp.21-27

[46] McDowall NZ Freshwater Fishes, p.416

[47] ibid. pp.104-113,409; Grace, pp.510-512; McDowall The NZ Whitebait Book, pp.11-13; Stokell, pp.21-27

[48] J.S. Armstrong 'Notes on the Biology of Lake Taupo' TPNZI 65 (1935): 88-94, p.92; P. Burstall 'Trout Fishery — History and Management' in D.J. Forsyth and C. Howard-Williams (eds) Lake Taupo — Ecology of a New Zealand Lake Wellington: Department of Scientific and Industrial Research, 1983, p.119; Fletcher, pp.260-261; McDowall NZ Freshwater Fishes, p.416; Strickland, p.18; R. Gerard Ward 'Maori Settlement in the Taupo Country 1830-1880' JPS 65 (1956): 41-44, p.42

feeding the lake.[49] There were also a number of kōaro taken in Rotorua, but as they were regarded as kōkopu by Māori the two fisheries cannot be distinguished. Although the fish is found in a number of other parts of the country, there is little reference to any other significant fisheries.

The inanga is another fish which suffers from a confused and confusing nomenclature. When used of an adult fish, inanga is the single species *Galaxias maculatus* (formerly *G. attenuatus*). However, when applied to juvenile fish, it tends to be an umbrella term used to refer to the juvenile or intermediate forms of a number of the galaxiid species and smelts, or as a synonym for whitebait. There was some distinction between the adult and juvenile inanga in the western North Island, where the juvenile was known as ngaore.[50] Inanga proper live only in coastal areas, in any area of fresh water accessible from the sea. Adult inanga can grow as large as 170 mm long, but most reach no more than 110 mm. The fish come down the rivers in vast numbers in late summer and autumn to spawn in tidal areas, after which they die. Once the eggs hatch, the baby inanga are washed out to sea on the tide. These young fish then return to fresh water as whitebait in spring, and move up into streams and lakes where they mature into adult fish. Inanga make up by far the majority of the whitebait run, up to 95% in some areas.[51]

Māori fishers concentrated on runs of adult inanga rather than whitebait, although there were substantial whitebait fisheries in areas where there were always good runs, such as the West Coast and North Canterbury. There were adult inanga fisheries in the Whanganui River, Lake Horowhenua, and Canterbury,[52] with the fish often being taken in great numbers while on their

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[49] Memo from Minister of Marine to Minister of Native Affairs (n.d.), M 1/7/132, N.A.; Grace, p.514; McDowall NZ Freshwater Fishes, p.112; Phillipps 'The Koaro', p.190; Phillipps 'Notes on the Edible Fishes of New Zealand', p.119; Stokell, p.24. See page 279 *infra*.

[50] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.T.3; Leslie Adkin Horowhenua Wellington: Department of Internal Affairs, 1948, p.18; Anonymous 'Inanga (Whitebait)' Whanganui River Annual 1990:38; Burstall 'The Introduction of Freshwater Fish into Rotorua Lakes', p.245; Firth Economics, pp.81-82; Fletcher, p.259; Grace, pp.509,512; Hector, p.129; McDowall NZ Freshwater Fishes, pp.65,414-415; Strickland, pp.16,23; Tikao, p.137

[51] McDowall NZ Freshwater Fishes, pp.117-127; McDowall The NZ Whitebait Book, pp.11-13; Stokell, pp.36-38

[52] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.U.6; 'Inanga (Whitebait)', p.38; Downes 'Notes on Eels and Eel-Weirs', pp.306-307; Mair 'Notes on Fishes in Upper Whanganui River', pp.315-316; Ombler, p.32; Richard Taylor, p.382; Adkin, p.18; Rod McDonald Te Hekenga: Early Days in Horowhenua Palmerston North: G.H. Bennett & Co., pp.52-56; Beattie Maori Place Names of Canterbury, p.63; Beattie Traditional Lifeways, pp.139-140,310,314; Best Fishing Methods, p.208; Tikao, pp.129,137; Ngai Tahu Report, p.154; Ngai Tahu Sea Fisheries Report, p.10

spawning run to the sea. Large inanga fisheries recorded in inland areas such as Lake Taupō and Rotorua refer to smelt or the young of other galaxiid species, as inanga proper are not able to penetrate very far inland.[53]

Although whitebait are the juvenile form of a number of fish, they are regarded as forming a separate fishery by both Māori and Pākehā. Whitebait are mostly juvenile inanga, but runs also contain the juvenile forms of kōaro, banded kōkopu, giant kōkopu, and the rare shortjawed kōkopu (*Galaxias postvectis*). They are generally known in Māori as inanga, although mata is the more common name in the South Island.[54] Whitebait can be found entering streams and river mouths all around the country during the spring months as the juveniles return from their short stay in the sea. They must have been very numerous in pre-contact times, as even now it is estimated that up to 500 million whitebait are caught annually on the West Coast alone.[55] They were once a very important food source in areas where big runs took place, as they were one of the richer and more palatable freshwater fish, and could easily be preserved for later consumption.[56] Traditional fisheries are known in the Waikato River, the West Coast, Southland, the Whanganui River, and throughout Canterbury.[57]

The smelt (*Stokellia anisodon*) is another fish which is very similar to whitebait and adult inanga in both appearance and habitat, and has often been mistaken for those fish. They are known by a number of Māori names, including pōrohe, paraki, mauri, ngaore, and sometimes

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[53] Grace, pp.512-513; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', pp.435,441-442; D.M. Stafford Te Arawa — A History of the Arawa People Auckland: Reed, 1967, pp.21,87

[54] Beattie Traditional Lifeways, pp.140,308; Brunner, p.286; Tikao, p.137

[55] McDowall The NZ Whitebait Book, pp.11-13; McDowall NZ Freshwater Fishes, pp.125,434-437

[56] Best The Maori Vol. II, p.449; McDowall NZ Freshwater Fishes, p.414; W. Tyrone Power Sketches with New Zealand in Pen and Pencil London: Longman, Brown, Green and Longmans, 1849, p.78

[57] Anderson 'West Coast South Island', pp.107-108; 'Inanga (Whitebait)', p.38; Beattie Traditional Lifeways, pp.139-147,308,310-312; Brunner, p.286; Charles Heaphy 'Notes of an Expedition to Kawatiri and Araura, on the Western Coast of the Middle Island' in Nancy Taylor, p.238; McDowall NZ Freshwater Fishes, p.420; Ombler, p.42; Ranginui, pp.34-35; Te Maire Tau, Anake Goodall, David Palmer and Rakiihia Tau Te Whakatau Kaupapa: Ngai Tahu Resource Management Strategy for the Canterbury Region Wellington: Aoraki Press, 1990, p.5-16; Tikao, p.137; Waitangi Tribunal Finding of the Waitangi Tribunal on the Manukau Claim (Wai 8) Wellington: Government Printer, 1985, p.71; Ngai Tahu Sea Fisheries Report, p.10

inanga; Pākehā know them also as silvery or cucumberfish, because of their distinctive smell.[58] Most spend almost all their lives at sea, coming into the rivers only to spawn in spring and summer, but there are some lake populations, both estuarine and land-locked. The sea-going fish grow to 80-100 mm long, with lake fish only reaching 50-60 mm.[59] A number of the lake populations appear to have been introduced, although as smelt have long been regarded as a valuable trout food it is hard to determine which populations were introduced by Māori and which by Pākehā in waters where trout are also present.[60] Smelt were utilized as a food fish, taken towards the end of and after the whitebait run as they entered the rivers to spawn, or netted in those lakes where they were always present.[61] They were taken while running in a number of Canterbury rivers, the Whanganui River, and on the West Coast; and were caught at other times in Lakes Forsyth and Ellesmere (Wairewa and Waihora).[62]

Toitoi, or bullies, are some of the commonest freshwater fishes in New Zealand, but were not particularly important as food fishes except in areas where other fish were not readily available. Toitoi is an umbrella term for six related species — the cockabully (*Trypterygion nigripenne*) and five members of the genus Gobiomorphus, one of which (the giant bully or *G. gobioides*) is also known as kōkopu. Toitoi are known also as tītarakura by Tūhoe and as pakoko in the Waikato.[63] The cockabully proper is confined to brackish waters, such as those found in river mouths and estuaries, while other species are found in streams, rivers and lakes around the country. The various species are all rather small, reaching sizes of between 50 and 150 mm.

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[58] Beattie Maori Place Names of Canterbury, p.63; Best The Maori Vol.II, p.450; McDowall NZ Freshwater Fishes, p.65; Phillipps 'Additional Notes on New Zealand Fresh-water Fishes', pp.290-291; Phillipps 'Notes on the Edible Fishes of New Zealand', p.119; Ranginui, pp.34-35; Stokell, pp.11-12

[59] McDowall NZ Freshwater Fishes, pp.65-77; Stokell, pp.11-18

[60] Memo from D.F. Hobbs, Senior Fisheries Officer Marine Department, to Controller of Wildlife Division, Department of Internal Affairs, 10/3/1955, M 8/1/2/19, N.A.; McDowall NZ Freshwater Fishes, pp.69-71; Stokell, pp.13-15; Strickland, pp.13-14,18,21-22

[61] McDowall NZ Freshwater Fishes, p.414; McDowall The NZ Whitebait Book, p.15

[62] Beattie Traditional Lifeways, pp.140,310-312; Downes 'Notes on Eels and Eel-Weirs', p.307; Norm Hubbard 'The Wanganui Smelt Fishery' Freshwater Catch 4 (1979): 10-11; Phillipps 'Additional Notes on New Zealand Fresh-water Fishes', pp.290-291; Phillipps 'Notes on the Edible Fishes of New Zealand', p.119; Ranginui, p.34; Tikao, p.137

[63] Best Fishing Methods, p.225; McDowall NZ Freshwater Fishes, p.409; Te Rangi Hiroa 'The Maori Craft of Netting', p.640

Some of the inland populations, including the common bullies (*G. cotidianus*) found in Rotorua and Lake Taupō, may have been introduced.[64] Toitoi were caught in the Whanganui River, Lake Taupō, Rotorua and Rotoiti, and by Tūhoe, but were not favoured eating if anything else was available. They seem to have been mostly taken over winter, when other fish were often scarce.[65]

The papanoko or torrentfish (*Cheimarrichthys fosteri*) is another fairly common freshwater fish which was taken by Māori when it could be found, as its secretive habits led it to be known also as 'te ika huna a Tānemahuta' (the hidden fish of Tānemahuta). Elsdon Best listed 13 variant names for this fish including panoko, pāpāuma, papaki and panepane. Freshwater references to rock cod (a related marine species) may also refer to the papanoko as the two species are similar.[66] It prefers stony riverbeds and very shallow, fast-flowing waters, and so is often found in rugged rivers such as the Rakaia. It is found in the rapids by day but moves into the pools at night. Being another sea-migratory species, it is usually found quite close to the coast, but has been known to go as far as Taumarunui up the Whanganui River, and up the Rakaia to Lake Coleridge. It usually grows to 100-125 mm, but can reach 160-200 mm. Juvenile papanoko enter the rivers from the sea in spring and autumn, then move upriver into their adult habitat, but spawning behaviour is not well understood.[67] The papanoko fishery was surrounded by a great deal of ritual, and the fish were regarded as highly tapu. Those caught in Hawke's Bay were never taken inside a pā, nor boiled.[68] They were caught in the Whanganui River, Canterbury, Hawke's Bay and East Coast.[69]

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[64] Burstall 'The Introduction of Freshwater Fish into Rotorua Lakes', pp.245-246; McDowall NZ Freshwater Fishes, pp.292-315,421; Stokell, pp.53-61

[65] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.T.3; Johannes Andersen Maori Place-names also Personal Names and Names of Colours, Weapons, and Natural Objects Wellington: Polynesian Society of New Zealand, 1942, p.301; Armstrong, pp.91-92; Best 'Food Products of Tuhoeland', p.79; James Cowan The Maori Yesterday and To-day Auckland: Whitcombe and Tombs, 1930, p.182; Downes 'Notes on Eels and Eel-Weirs', pp.306-307; Firth Economics, pp.72-75; Mair 'Notes on Fishes in Upper Whanganui River', p.315; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', pp.435,438,440

[66] Best Fishing Methods, p.200; McDowall NZ Freshwater Fishes, p.286; G. Mair 'Notes on Fish found in the Piako River' TPNZI 35 (1902): 319-320, p.319

[67] McDowall NZ Freshwater Fishes, pp.286-291; Stokell, pp.62-64

[68] Phillipps 'Notes on the Fresh-water Fish Papanoko', pp.167-168

[69] ibid.; Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.T.3; 'Access courses', p.39; Downes 'Notes on Eels and Eel-Weirs', pp.306-307; Beattie Maori Place Names of Canterbury, p.63; Beattie Traditional Lifeways, pp.146,311; Te Rangi Hiroa 'The Maori Craft of Netting', p.640

Two types of pātiki or flounder are found in fresh water in New Zealand, the black flounder (*Rhombosolea retiaria*) and the yellowbelly flounder (*R. leporina*). Māori know the black flounder more specifically as mohoao and the yellowbelly as pātōtara or raututu.[70] The mohoao usually grows up to 200-250 mm but can reach double that size. Mohoao are common in estuaries and the lower reaches of rivers, but have been known to travel up the Whanganui to Ōhura, about 250 km inland, and to the headwaters of the swift-flowing Clarence River. The yellowbelly is more of a marine fish, usually found in brackish rather than truly fresh waters. It is slightly larger than the mohoao. Flounders hatch and develop at sea before moving into fresh waters around the coast, and are highly migrational.[71] As most New Zealand flounder are primarily marine species, the flounder fishery was more of a saltwater than a freshwater one, but the mohoao fishery was an important one in the areas where the fish was particularly common and easily caught. There were appreciable numbers of mohoao taken in shallow coastal lakes (where they could be netted in bulk) such as Lakes Wairarapa and Ōnoke, and Ellesmere (Waihora), and in the lower reaches of rivers like the Whanganui, the Waikato, and the Clutha.[72] Waihora in particular was famous for the richness of its flounder fishery.

The kōura or freshwater crayfish (*Paranephrops planifrons* and *P. zealandicus*) is a crustacean rather than a fish, but was caught alongside various fish species and was considered part of the fishery resource. It resembles the marine lobster, also called kōura by Māori, but is considerably smaller, being usually only 50-125 mm long, lake kōura being usually bigger than those in rivers. They are found throughout the country, hiding under rocks or in mud in deep water by day and coming out into shallow water at night. They are not usually found in waters where eels are abundant. Kōura populations have been badly predated by trout since their introduction, especially in the Thermal Lakes.[73] As a food source kōura were favoured in places

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[70] Taiaroa 'Account on Gathering Flounder', pp.1-2

[71] McDowall NZ Freshwater Fishes, pp.322-327

[72] ibid. p.325; Evidence of John Alfred Jury, Wairarapa Lakes Commission Report, p.19; Beattie Traditional Lifeways, pp.149-150,308; Best Fishing Methods, pp.226-227; Harry Evison The Treaty of Waitangi & the Ngai Tahu Claim: A Summary Christchurch: Ngai Tahu Maori Trust Board, 1988, p.42; Mair 'Notes on Fishes in Upper Whanganui River', p.316; Ranginui, pp.34-35; Taiaroa 'Account on Gathering Flounder', p.1; Te Whakatau Kaupapa, p.5-49; Tikao, pp.129,137; Manukau Report, p.71; Ngai Tahu Report, p.154

[73] Evidence of D.F. Hobbs to Royal Commission on Wanganui River 1950, para. 39, 1925/2644, M 1/7/5, N.A.; Ann Chapman and Maureen Lewis An Introduction to the Freshwater Crustacea of New Zealand Auckland: Collins, 1976, pp.189,195; Fletcher, p.264; Grace, p.514; McDowall NZ Freshwater Fishes, pp.167,194

like the Thermal Lakes where other big fish were less common,[74] especially as they could be taken over several months of the year and preserved. They were also found in small side-streams throughout the country, and were used to provide some dietary variety in places like the Whanganui catchment and North Canterbury.[75] Kōura were one of several species transferred by Māori to areas where fish were scarce. Te Arawa attribute the introduction of kōura into Rotorua to Ihenga, an early ancestor, who carried them there in a water-filled gourd from Maketū.[76] Such accounts are undoubtedly based in fact, as Rotorua and Taupō were unlikely to have had large fish populations because of cataclysmic volcanic activity in the area in the centuries before Māori arrived in the country.[77]

The kākahi or freshwater mussel is another food source of a type more usually associated with the marine fishery. Regional variant names include kaiehau in Nelson and tairaki in Waikaremoana.[78] There are two species, *Hyridella aucklandia*, found only in the North Island, and *H. menziesi*, found nationwide. There is considerable local variation among both species. Kākahi are found throughout the country in lakes and streams with a sandy or silty bottom, and reach 60 mm in length. There were established kākahi fisheries in Lake Horowhenua and the Thermal Lakes.[79] In areas where the kākahi was regarded as a particular delicacy, such as Rotorua, the taking of the shellfish was often the subject of much ceremonial and showmanship.

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[74] Best The Maori as he was, pp.259,282; Best 'Food Products of Tuhoeland', p.77; Burstall 'Trout Fishery', p.119; Cowan The Maori Yesterday and To-day, p.182; Firth Economics, pp.72-75,81; Fletcher, p.259; Grace, pp.509,513-514; Makereti, pp.239-240; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', pp.435,450-451; Gerard Ward, p.42

[75] 'Access courses', p.39; Ombler, p.32; Te Whakatau Kaupapa, pp.5-16,5-22; Ngai Tahu Sea Fisheries Report, p.10

[76] Mair Reminiscences and Maori Stories, pp.41-44; Edward Shortland Maori Religion and Mythology London: Longmans, Green, and Co., 1882, pp.85-87; Stafford Te Arawa, pp.40-41

[77] Burstall 'The Introduction of Freshwater Fish into Rotorua Lakes', pp.245-246; Strickland, pp.21-22. See pages 274,276 *infra*.

[78] Best 'Food Products of Tuhoeland', p.80; Brunner, p.262

[79] Memo from Under Secretary of Internal Affairs to Secretary Marine Department, 29/11/1930, M 1/7/102, N.A.; Adkin, p.18; Best 'Food Products of Tuhoeland', p.80; Best The Maori Vol. II, p.419; John Child New Zealand Shells Auckland: Fontana Periwinkle, 1974, pp.27-28; Cowan The Maori Yesterday and To-day, p.182; Firth Economics, p.171; Fletcher, pp.259,263; Grace, pp.519,514; Makereti, p.240; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', p.435; Stafford Te Arawa, p.64; Gerard Ward, p.42

However, in other places such as Taupō, the kākahi was never held in much regard as a food source.[80]

Capture methods

Māori fishing was undertaken on a range of levels, from mass capture projects requiring substantial labour and expertise, to methods which even young children could utilize. Most early Pākehā observers of Māori fishing concentrated on the mass capture methods, particularly those used to take eels and other migratory species, finding these more noteworthy than the less spectacular yet equally effective small-scale methods which were undoubtedly also used.[81] At the risk of artificially categorizing fishing methods, they could be roughly divided into three types — those employing permanent structures or systems requiring considerable labour input and technical expertise for their manufacture; those requiring some sort of manufacturing or engineering skills but able to be used by an individual or a small group; and those opportunistic methods which could be employed anywhere by almost anyone, with a minimum of necessary equipment or knowledge. Obviously, some fishing practices cut across these divisions, an example being *pā tuna* or eel weirs, which could be built with solid beams to last generations and withstand major floods, or which could be constructed quickly out of mānuka branches and brushwood for temporary use in any side stream.

Perhaps the most impressive of the methods used for the mass capture of freshwater fish were the canals or tracks found in some parts of the country, which were used to channel migrating eels and other fish into waiting nets and traps. Water-filled canals were to be found around the Wairau Lagoons and lower Opawa River in Marlborough, where they had a combined length of nearly twenty kilometres, the main canal alone being some seven km long. Some of the bigger canals were up to four metres wide and held a metre of water at high tide, implying that

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[80] Brunner, p.262; Firth Economics, p.171; Grace, p.514; T.H. Smith 'Maori Implements and Weapons' TPNZI 26 (1893): 423-452, p.429

[81] See for example the comments about giant eel weirs made by Augustus Hamilton Fishing and Sea-Foods of the Ancient Maori Wellington: Government Printer, 1908, p.65; Johnstone, pp.98-99; Edward Shortland Traditions and Superstitions of the New Zealanders London: Longman, Brown, Green, Longman, & Roberts, 1856, pp.211-212

the food able to be taken from them warranted the massive investment of labour needed to build on such a scale, using only wooden and stone tools. The canals were used for catching moulting birds as well as providing a substantial eel harvest. There were pits of sand placed along the edges of the canals, into which the eels were thrown to suffocate after being netted, so as not to bruise the flesh. While Roger Duff implied that the canals were of ancient construction, others including local Rangitāne elders averred that they were built by Rangitāne from the mid to late eighteenth century.[82]

Smaller and shallower networks of drains were found throughout the Horowhenua district, most notably at Tangimate lagoon. There was a network of twelve linked canals or *whakamate* draining that lagoon, some of which were cut at awkward angles and through ridges. The single canal at Pakauhōkio swamp was the oldest and largest in the district, being nearly 100 metres long and cutting through an eight-metre-high ridge. The canals were unblocked and *hīnaki* (eel traps or pots) were placed in them at the appropriate season to take migrating eels.[83] Local historian Leslie Adkin believed that the purpose of the canals was to allow a number of separate eel fisheries, so as to avoid disputes at distribution time. He also believed that the Tangimate *whakamate* were of relatively modern construction, probably late eighteenth to early nineteenth century, although others found elsewhere were much older. Remains of similar canal systems have also been found near Lakes Te Anau and Manapōuri.[84] Elsewhere, channels were dug which were not deep enough to carry running water, but were designed rather to create a moist strip through an otherwise dry or sandy area. The eels would seek to travel along these rather than dry land when making their spawning migration, and could be easily picked off. Examples of this type of channelling have been found near the mouth of the Rangitīkei River.[85]

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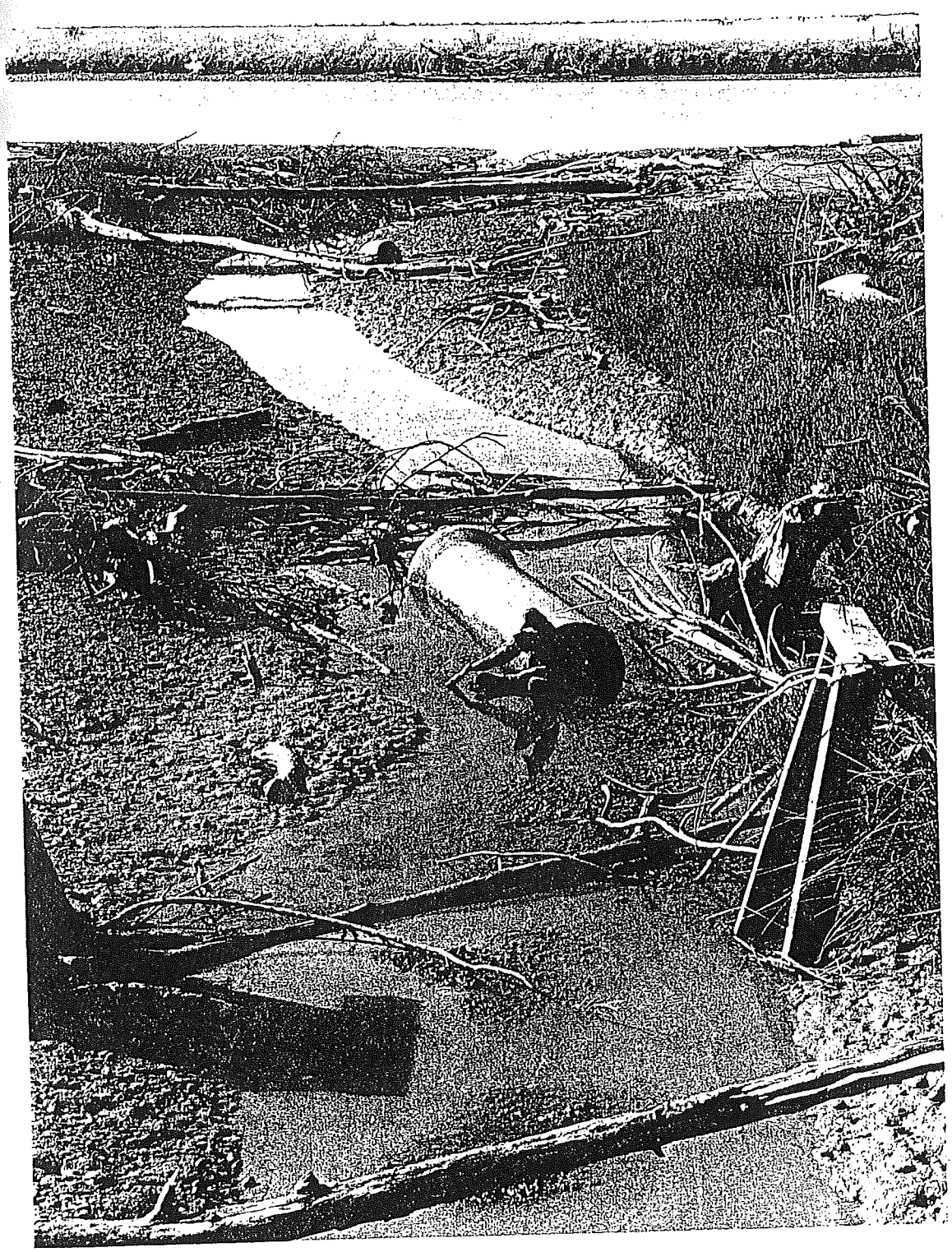
[82] Best Fishing Methods, p.104; Roger Duff The Moa-Hunter Period of Maori Culture Wellington: Government Printer, 1977, p.26; W.J. Elvy Kei Puta te Wairau: A History of Marlborough in Maori Times Christchurch: Whitcombe and Tombs, 1957, pp.35-37; Brian Sheppard and Tony Walton 'Eel-trapping Channels at Tangimate Lagoon, Horowhenua' NZAAN 26 (1983): 137-144, p.143; W.H. Skinner 'Ancient Maori Canals. Marlborough, N.Z.' JPS 21 (1912): 105-108

[83] Adkin, pp.20,25-30,282-283,288,357-358; Sheppard and Walton, pp.137-142

[84] Adkin, pp.19-20;25-26; R.J.S. Cassels, Kevin L. Jones, A. Walton and Trevor H. Worthy 'Late Prehistoric Subsistence Practices at Parewanui, Lower Rangitikei River, New Zealand' NZJA 10 (1988): 109-128, p.125; Peter Coutts 'Fiordland' in Prickett, p.145; Sheppard and Walton, p.140

[85] Cassels et al., pp.109-110,117

Fig. 2 **Artificial eel channels, Wairau Lagoons, Marlborough**
The narrow channel in the foreground, linking a shallow lagoon to one of the larger natural channels at the mouth of the Wairau River, forms part of the extensive twenty kilometre network of channels constructed by Māori in the Wairau lagoons for the capture of eels and moulting birds. On the banks of this channel was a large regular depression, possibly the remains of a pit used to store the eels once caught.
Photograph: Suzanne Doig



Fish weirs[86] were the other major fishery method which required a substantial commitment of time and energy for their construction and use. They were sophisticated structures, used most often to take large quantities of single species as they migrated to or from the sea. Structural variations were to be found in different rivers and lakes because of physical factors such as water depth, flow volumes and flood range, but the archetypal 'V'-shaped eel weir known as a *pā tuna* (also a general name for any type of eel weir) was found in most parts of the country. Other common types were the *pā auroa* or parallel fences used in swifter waters, and the *utu piharau* which was used to catch lamprey migrating upstream. The number of men needed to make these weirs, and the size of catch they produced, meant that the large weirs were usually the common property of a larger community such as a hapū or *kāinga*.[87]

Pā tuna generally consisted of two wings, in a 'V' shape with a narrow gap (or *ngutu*) between, to which leading nets (*poha*) and *hīnaki* were attached. Larger weirs might take the form of a zigzag, with a number of wings and attached traps. They were used in waters which were shallow enough to have posts driven into them, and the posts were then wattled with mānuka sticks and brushwood, allowing water but not eels to pass through the structure. They were usually built in summer when river levels are lower, making construction easier. The lighter parts of the weir, such as the wattles, were often removed from the water after the eeling season to extend their life. The larger weirs were extremely durable, and their value was reflected in the names that were given to them, often commemorating an ancestor of the weir-builders. The main posts were sometimes also carved.[88] Only men were involved in the manufacture and operation of any sort of weir, women being restricted to other forms of fishing.[89]

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[86] According to the Oxford English Dictionary, a weir is "a fence or enclosure of stakes made in a river, harbour, etc., for taking or preserving fish". Most of the weirs constructed by the Māori would be better described in English as kiddles or kettles, which are weirs with openings at which nets are set, but as this word is little-used in the New Zealand literature the term weir shall be used throughout to describe both types of structure.

[87] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.U.3; Firth Economics, p.350; McDonald, p.54; Maxwell J.G. Smart and Arthur P. Bates The Wanganui Story Wanganui: Wanganui Newspapers, 1972, p.32; Muriwhenua Fishing Report, p.48

[88] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.V.1; Adkin, pp.19-24; Beattie Traditional Lifeways, pp.317-320,502; Best Fishing Methods, pp.131-145; Best The Maori as he was, pp.275-276,279; C.S. Curtis 'Notes on Eel Weirs and Maori Fishing Methods' JPS 73 (1964): 167-170, p.169; Makereti, pp.245-246

[89] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.T.5; 'Access courses', p.39; Ranginui, pp.34-35. See pages 178-179 *infra*.

Areas famed for their eel resource would have large numbers of these *pā tuna* in small areas, as weirs did not usually block the entire stream. There were twenty-four weirs in the Hōkio Stream, which drains Lake Horowhenua and is only about five km long, and some rapids on the Whanganui River might support as many as eight weirs.[90] Many of the major lakes and rivers were noted for their gigantic and durable *pā tuna*, especially the Waikato, where weirs were built from poles 60 cm thick,[91] and there was a famed weir in one of the Rotorua Lakes which had 400 metre long arms extending into the lake near the outlet down which the eels migrated. At the height of the run, the giant *hīnaki* attached to this *pā tuna* would have to be emptied every hour.[92]

Construction of these weirs must have been extremely time-consuming, as even in the early twentieth century the construction of a basic weir in a small stream took eight men three days, using metal tools; but even a small weir like that could take 1000-1500 kg of eels in a season.[93] Eels were not the only species taken in the large weirs, as in some places they were used to take papanoko, inanga, and upokororo, with many species also being taken as by-catch alongside the eels.[94] Similarly-shaped zigzag fences called *rau matangi* were also constructed in Lake Horowhenua, but these had baited *hīnaki* at each apex to take eels as they swam about the lake, and were usually of temporary use.[95]

Pā auroa were specially constructed in broad, rapid rivers such as the Whanganui to withstand the high water flows and occasional heavy flooding to which these rivers are subject, and which conventional *pā tuna* could not cope with. To reduce water resistance and thus wear and tear, two or three fences were constructed at the head of a rapid, nearly parallel to the line of

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[90] Adkin, p.23; McDonald, p.48; Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.T.5

[91] Andersen, p.306; Downes 'Notes on Eels and Eel-Weirs', p.297; Hamilton, p.67

[92] Hamilton, pp.67-68; Johnstone, pp.99-101

[93] Downes 'Notes on Eels and Eel-Weirs', p.307; Marshall, pp.59,70-71

[94] Beattie Traditional Lifeways, pp.149-150,310-311; Best 'Food Products of Tuhoeland', pp.77,79; Best The Maori Vol. II, p.450; Downes 'Notes on Eels and Eel-Weirs', pp.306-307; McDonald, pp.52,56; McDowall NZ Freshwater Fishes, p.415; Phillipps 'Additional Notes on New Zealand Freshwater Fishes', pp.290-291; W.A. Pullar 'Fish Weir Discovery, Rotorua' Historical Review Whakatane and District Historical Society 23 (1975):98; Ranginui, p.35

[95] Adkin, pp.19-20; McDonald, p.48

current, with *hīnaki* set at the downstream end. The fence served to steer the eels into the *hīnaki* rather than to trap them. The rows of stakes were usually 18-24 metres long, braced by a long tree trunk lashed on horizontally, with each row a few metres apart. They were so sturdy that if properly maintained they would almost never need replacing, and even when allowed to fall into disrepair, their remains could last for generations. *Pā auroa* were extremely difficult to construct as they had to be built from canoes, and it could take four to six men a week to build the most basic *pā*, with the major weirs taking at least three weeks.[96] The time put into a *pā auroa* was justified by the yields obtained, with catches of 500 kilograms per night being recorded at some weirs — Gilbert Mair saw 350 kg of eels taken from two *hīnaki* alone at Whenuatere in 1879. With up to 442 weirs on the Whanganui (each fence counting as a single weir), this amounted to a huge annual take of eel flesh.[97] It would appear that the building of these large weirs on the Whanganui was undertaken from early pre-contact times, with Downes' earliest reference to a *pā tuna* dating back to a fight in about the late sixteenth century, when one victim's dismembered leg was washed into a weir.[98]

The lamprey weirs used on the Whanganui River (*utu piharau*) and elsewhere (they were known as *pā kanakana* in Canterbury) worked on the same principle as the eel weir, with fences directing the fish into pots or traps, but as lamprey migrate *en masse* upstream rather than down a different structure was needed. Extremely strong, well-braced, and heavily wattled fences were built perpendicular to river banks, along which the lamprey ran. A number of openings or *ngutu* were left in the fences, with nets and *hīnaki* set downstream of these gaps. As the lamprey crowded together and tried to pass through the *ngutu*, the force of the water flowing through washed them back into the nets. *Utu piharau* were built and repaired during late summer when river levels were low and construction could be undertaken on dry land, the weirs being submer-

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[96] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.U.1; Andersen, pp.306-307; Best Fishing Methods, pp.145-147; Best The Maori as he was, p.275; Best The *Utu piharau*, or Lamprey-weir, as constructed on the Whanganui River Wellington: Government Printer, 1924, p.25; Robert D. Campbell Rapids and Riverboats on the Wanganui River Wanganui: Wanganui Newspapers, 1990, p.12; Downes History and Guide, pp.47-48; Downes 'Notes on Eels and Eel-Weirs', *passim*; Mair 'Notes on Fishes in Upper Whanganui River', p.315; David Young 'Eel Weirs v River Steamers' Whanganui River Annual 1990:36

[97] Wharawhara Topine, Whanganui River Bed Hearing, 3/11/1938, Wanganui Native Land Court Minute Book 99, p.260; Mr. Spratt (Solicitor for Maori Claimants), Closing Address, Wanganui River Commission Proceedings, p.3K.2; Downes History and Guide, p.48; Mair 'Notes on Fishes in Upper Whanganui River', p.315

[98] Downes 'Notes on Eels and Eel-weirs', p.297; T.W. Downes Old Whanganui Hawera: W.A. Parkinson, 1915, p.51

ged by the autumn rains, which can cause the Whanganui to rise several metres overnight.[99] Elsdon Best witnessed the building of an *utu piharau* at Jerusalem in 1921, and recorded that it was 35 feet long, braced by about ten heavy mānuka posts and two rails, with five openings for *hīnaki*.[100] Other observers recorded catches of 1000 to 1200 lamprey in a single night from these early twentieth century weirs, and until recently 600 a night could be taken.[101]

Weirs were not only used to capture tons of eels in the bigger rivers and lakes, as smaller versions could be constructed quickly in many side-streams to take advantage of the annual migration of eels and other fishes. These too were known as *pā tuna*, and generally consisted of two simple barriers in a 'V' shape with a *poha* (leading net) and *hīnaki* set at the apex. These small *pā tuna* were simple enough to be built by individuals or the men of a single whānau.[102] Such a simple weir was made in the Waiapu River by the party from the Dominion Museum (including Elsdon Best and Te Rangi Hiroa) which visited the East Coast in 1923. The weir was used to catch papanoko and eels, with kōkopu and upokororo also being caught in similar weirs at different times in that area.[103] This type of weir was especially useful in the streams feeding into lakes such as Wairarapa Moana, because they could easily be moved upstream as the waters rose behind the closed lake mouth in autumn.[104]

Like the small eel weirs, artificial channels could also be scaled down to be used by a smaller group or on a less permanent basis. Commonly used was a temporary channel dug into the gravel of a river bed which diverted some of the river flow, into which fish would swim and be easily netted or taken in *hīnaki*. Groynes were sometimes employed to divert the fish into the

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99 Beattie Traditional Lifeways, pp.148-150,317; Best Fishing Methods, pp.189-197; Best The Maori Vol. II, pp.444-446; Best The Maori as he was, pp.279-281; Best The *utu piharau*, pp.25-30; Downes History and Guide, p.48; Downes 'Notes on Eels and Eel-Weirs', p.313; McDowall NZ Freshwater Fishes, p.409

100 Best The *Utu piharau*, pp.26-28

101 Evidence of Albert Edward Davey, Wanganui River Commission Proceedings, p.2C.2; Henare, p.38; Todd, p.20

102 Evidence of Albert Edward Davey, Wanganui River Commission Proceedings, p.2D.1; Adkin, pp.19-20; Best The Maori as he was, p.275; Downes 'Notes on Eels and Eel-Weirs', pp.307-308; Firth Economics, pp.224,350; John Johnson 'Notes from a Journal' in Nancy Taylor, p.141; Te Rangi Hiroa 'The Maori Craft of Netting', pp.639-640

103 Best Fishing Methods, pp.132,142-143; Craig, p.188. See Fig. 1 page 145 *supra.*

104 Evidence of Ahitana Matenga, Tipua Mapunatea hearing, 8/3/1890, Wairarapa Native Land Court Minute Book [hereafter MB] 13, pp.171-172; A.G. Bagnall Wairarapa: An Historic Excursion Masterton: The Masterton Trust Lands Trust, 1976, p.377

channels from the river. White stones were often placed on the bottom of the channels so the fish could be seen entering. This method was known as *awa-whaka-heke* in the South Island and *kōumu* elsewhere. The channels were sometimes walled, to make it easier to set nets at them, and the fish might also be driven into the channels by beaters. New channels were dug as the water levels in the rivers changed. Other species taken this way included eels, inanga, smelt and kōkopu.[105]

A similar method, also called *kōumu*, was used to catch migrating fish (especially eels) at the mouths of lakes and rivers which were cut off from the sea by a gravel spit or bar. Deep channels were cut into the landward side of the bar, at right angles to the sea shore, and the fish would sense the salt water seeping into the channels and travel into them. The channels would then be blocked off and the fish netted, or simply picked off the gravel as they tried to carry on over the bar. There were famous eel fisheries which utilized this method at Waihora and Wairewa (Lakes Ellesmere and Forsyth), where the channels were called *wakawaka*, and at Wairarapa Moana.[106]

An important part of the fish weir, the *hīnaki* or eel-pot, could also be used as a stand-alone method of taking fish. These complicated traps were said to be the invention of Māui, who developed the turned-in entrance (like that of a crayfish pot) which makes it difficult for the eels to escape once they have entered the *hīnaki*.[107] They were normally roughly cylindrical or barrel-shaped, formed in one piece from bark or rods of mānuka and hoops of supplejack or other vines, lashed together with flax. The narrow entrance turned in upon itself, and often had a small piece of net attached to it to further confuse the eels when they sought to escape. *Hīnaki*-making was a prized skill, and if properly made and cared for they were extremely durable. Alternatively, trees

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105 'Access courses', p.39; 'Inanga (Whitebait)', p.38; Beattie Traditional Lifeways, pp.139,147-148,312-314,322; Best Fishing Methods, pp.130,205-215, 236-237; Best 'Food Products of Tuhoeland', p.79; Best The Maori Vol. II, p.449; Best The Maori as he was, pp.282-283; Hubbard, p.10; McDowall NZ Freshwater Fishes, p.413; Te Rangi Hiroa 'The Maori Craft of Netting', pp.636-637; Taiaroa 'Account on Gathering Eels', pp.2-3; Taiaroa 'Account on Gathering Whitebait', p.1

106 Beattie Traditional Lifeways, pp.149,316-317,502; Best Fishing Methods, pp.103,128-130,153-154,242; Best The Maori Vol. II, p.442; Downes 'Notes on Eels and Eel-Weirs', p.305; McDowall NZ Freshwater Fishes, pp.51,412; Gaela Mair 'Maori Occupation in the Wairarapa in the Protohistoric period' in B. Foss and Helen M. Leach (eds) Prehistoric Man in Palliser Bay Wellington: National Museum of New Zealand, 1979, p.22; Tikao, p.138; Ngai Tahu Report, p.156

107 Antony Alpers Maori Myths & Tribal Legends Auckland: Longman Paul, 1964, pp.50-51; Elsdon Best Maori Religion and Mythology Part II Wellington: Government Printer, 1982, p.354

could be ringbarked to provide the basis of a rudimentary *hīnaki* for passing travellers. Size varied from the 60 cm long pots used in small streams, to double-ended *waharua*, up to three metres in length, which were set in deep rivers and lakes.[108]

Hīnaki could be set on their own in lakes or rivers, either with their mouth facing upstream to take migrating eels or fish, or baited and placed with the mouth facing downstream to take passing eels at other times of the year. They were set at night and then lifted in the morning, or were lifted at intervals during the night when catches were particularly large. The baited *hīnaki* used to take non-migratory eels were called *kaitara* in the South Island.[109] Other types of fish taken included lamprey, upokororo, kōaro and inanga. Being portable, the *hīnaki* were particularly useful in areas where water levels and flows were variable. They could also be anchored or tied to posts in deep waters where weirs could not be constructed, such as in parts of the Waikato River, or in lakes, where eels did not move in any particular direction.[110]

Like *hīnaki*, nets made from flax (generic name *kupenga*) could be used as a portable and temporary fishing method. The large types of nets, such as the big drag nets and seine nets, took a considerable time to make and needed a number of people to operate them, but small scoop nets and the like could be used by an individual. The skill of making nets was an extremely valuable one, and net-makers in many areas were famed for their skill in making specialized nets to take the important species of their region. The construction and use (especially the first use) of the largest nets was a particularly tapu matter, in which men only were involved. However, these

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[108] Anonymous 'Eel pots fashioned from bark' JPS 36 (1927): 299; Best Fishing Methods, pp.157-184; Best The Maori Vol. II, pp.438-439; Grace, p.512; Poata, p.17; T.H. Smith, p.429; John Turnbull Thomson 'Extracts from a Journal kept during a Reconnaissance Survey of the Southern Districts of the Province of Otago' in Nancy Taylor, pp.329-330

[109] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, p.U.1; Beattie Traditional Lifeways, pp.146,317-318; Best Fishing Methods, p.159; Best The Maori Vol. II, p.439; Downes 'Notes on Eels and Eel-Weirs', p.298; McDowall NZ Freshwater Fishes, p.412; Gaela Mair, p.22; Ranginui, p.34; Andreas Reischek Yesterdays in Maoriland London: Jonathan Cape, 1930, pp.173-174; Tikao, p.138

[110] Letter from H.W. Kaipo to the Hon. Maui Pomare, 23/8/1913, M 2/10/6, N.A.; Wairarapa Lakes Commission Report, pp.12,19; Bagnall, p.377; Beattie Traditional Lifeways, pp.146,308; Elsdon Best 'An Eel Fiesta' NZJST 5 (1922): 108-109, p.109; Best Fishing Methods, pp.168,211; Best The Maori Vol. II, pp.432,439; Downes 'Notes on Eels and Eel-Weirs', p.297; Fletcher, pp.261,264; Grace, pp.512,515; McDowall NZ Freshwater Fishes, p.414; W.J. Phillipps The Fishes of New Zealand Vol. 1 New Plymouth: Thomas Avery & Sons, 1940, p.36; Phillipps 'The Koaro', p.190; Maxwell Smart 'Notes (Putiki)', Alexander Turnbull Library MS-Papers 1008:11

nets were most commonly used for sea-fishing rather than in inland waters, and women as well as men were traditionally involved in making other sorts of nets for the freshwater fishery.[111]

Drag or seine nets known as *kaharoa* were used in shallow waters, normally in lakes or estuaries, to take shoals of small fish like inanga. Either one person would stay on shore or in an anchored canoe holding one end of the net steady while another dragged the other end on foot or from a canoe, or both people dragged it through the water. Larger nets could require more than two people to handle them or to land the catch. They were used for upokororo and small shoaling fish, and for flounder at river mouths.[112] This method, with nets up to 100 metres long and 2½ metres deep with a mesh size as small as 1½ mm, was used to take juvenile fish and toitoi in Lake Taupō, while similar nets were used for smelt and pātiki in Waihora and Wairewa.[113] Large bag nets (called *ahuriri* or *riritai*), set mostly at river mouths, could reach up to 25 metres in length. They were used to catch fish such as upokororo, smelt or inanga, which swarmed around in shoals. Groynes were often constructed to steer the fish into these large capacity set nets. Smaller versions, called *kaka*, were used to take a wide variety of fish in streams and rivers.[114]

Small hand nets were used almost universally for the opportunistic capture of a wide variety of species. *Kupenga* and *kape* were commonly used to take kōkopu in streams, with the fisher (usually a woman) creeping up on the fish then startling it into the net.[115] Similar scoop nets with handles were widely used to take shoals of passing small fish, such as kōaro, inanga and whitebait, or to catch upokororo and eels. They were known by a number of different names, depending on the region and the species. Ngāti Porou used *kōrapa* to scoop up eels, while Tūhoe

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[111] Best Fishing Methods, pp.12-13,16-19; Best The Maori Vol. II, pp.399,403; Best The Maori as he was, p.265; Hamilton, p.65; Marshall, p.65; Te Rangi Hiroa 'The Maori Craft of Netting', p.599

[112] 'Access courses', p.39; Best Fishing Methods, pp.21,31,208-209; Best The Maori Vol. II, p.447; McDowall NZ Freshwater Fishes, pp.413-415; Mair 'Notes on Fishes in Upper Whanganui River', p.316; Makereti, p.240; Te Rangi Hiroa 'Maori Food Supplies of Lake Rotorua', p.438

[113] Armstrong, p.92; Beattie Traditional Lifeways, p.308; Best Fishing Methods, pp.205,227; Fletcher, pp.261-262; McDowall NZ Freshwater Fishes, p.415; Phillipps 'Additional Notes on New Zealand Freshwater Fishes', pp.290-291; Taiaroa 'Account on Gathering Flounder', pp.1-2

[114] *Waipapakura* v. *Hempton* 33 NZLR 1065, p.1072; Collector of Customs New Plymouth to Secretary of Marine, 26/8/1913, Memo 1913/2611, M 2/10/6, N.A.; Beattie Traditional Lifeways, pp.308,310-312; Best Fishing Methods, pp.26-27,31,203,210,228; Best The Maori Vol. II, p.409; Best The Maori as he was, pp.260-261; Brunner, p.265; Mair 'Notes on Fish found in Piako River', p.319; Phillipps 'Additional Notes on New Zealand Fresh-water Fishes', pp.290-291; Taiaroa 'Account on Gathering Whitebait', p.1; Tikao, p.137

[115] Andersen, p.299; Best Fishing Methods, pp.219-222; Best 'Food Products of Tuhoeland', pp.72-73; McDowall NZ Freshwater Fishes, pp.414-415

used *koko* to catch kōkopu.[116] There were also some specialized types of small nets, such as those used to take bottom-dwelling kōura in the Thermal Lakes. As well as the *tāruke*, or crayfish pot (much the same as the marine lobster pot, and working on the same principle as a *hīnaki*), they were caught in long nets which were dragged along the lake bed, or in baited basket nets called *pouraka* which were lifted gently up with the kōura in them. Similar lake-bottom nets could be used also to take kākahi.[117]

Nets were sometimes attached to dredge rakes to take bottom-dwelling species such as kōura and kākahi from sandy-bottomed waters. These dredge rakes were used on the end of a long pole to take these species in Lake Horowhenua and the Rotorua Lakes (where kōura dredges were called *paepae* and kākahi dredges *heki-kapu*). They were worked from a canoe, being dragged backwards and forwards across the bottom by a man standing in the stern. At Lake Taupō, someone would go out into the lake in a canoe tied to the shore, and press the dredge rake (there called *roukākahi* for taking kākahi and *hao* for the heavier dredges used for kōura) into the sandy bottom, and the canoe would then be pulled into shore while the rake operator kept the dredge hard against the bottom.[118]

There were a variety of other fishing methods which required a minimum of preparation or labour to take fish, and some of these were responsible for considerable catch-weights across a year. Most common were bobbing, spearing, groping by hand, and trapping with fern. (Fishing by hook and line does not seem to have been extensively used for taking freshwater fish.) These sorts of methods were used especially in small waterways, where there was not room for larger structures; for the taking of a few fresh fish to supplement a diet of vegetable food or preserved fish; and by travellers. They were also commonly used by women and children, who were not permitted to be involved in the more tapu aspects of using weirs and large nets.

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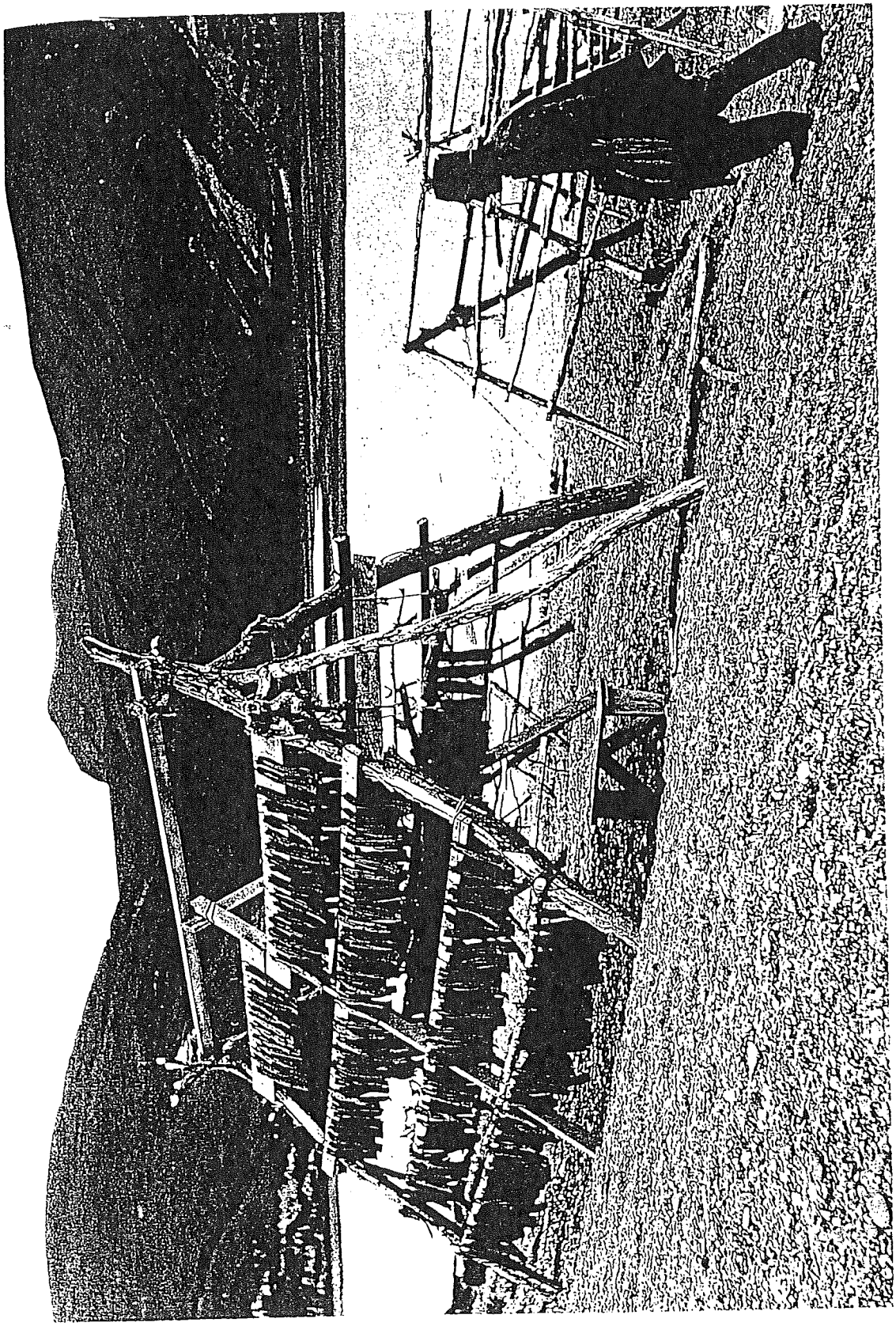
[116] 'Access courses', p.39; Best Fishing Methods, pp.124,216; Best The Maori Vol. II, p.449; Best The Maori as he was, pp.260,283; Grace, p.515; Te Rangi Hiroa 'The Maori Craft of Netting', p.637

[117] Best Fishing Methods, p.61; Burstall 'Trout Fishery', p.119; Fletcher, pp.259-260,262-263; Grace, p.513; Hamilton, p.65; McDowall NZ Freshwater Fishes, p.414; Alfred K. Newman 'On Maori Dredges' TPNZI 37 (1904): 138-144, p.140; T.H. Smith, p.429

[118] Best Fishing Methods, pp.65,78; Best 'Food Products of Tuhoeland', p.80; Best The Maori Vol. II, p.419; Best The Maori as he was, p.282; Fletcher, p.263; Grace, p.514; Makereti, pp.239,243; Newman, pp.139-141; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', p.438; T.H. Smith, p.429

Fig. 3 **Drying eels, Lake Forsyth (Wairewa), May 1948**
This shows eels which have been split and hung to dry in the sun and wind on a *whata*.
Photograph: K.V. Bigwood, courtesy of the Alexander Turnbull Library, Wellington, New Zealand, National Publicity Studios Collection ref. F40042½



Bunches of bracken or fern were used in a number of ways to trap fish, the common principle being that fish would enter the fern for shelter and could then be taken from it. The fern could be placed at posts or fences, or could simply be submerged in the water. Fern fences, or bundles placed at riversides (called *pepehi*, *whakarau*, or *whakaparu piharau*) were used in a number of rivers to trap lamprey and tunariki (glass eels), the fish being pulled out of the fern once they had lodged there. In the Thermal Lakes and elsewhere, kōura were taken in bundles of fern on a wooden frame or a long line (*tau* or *tauhuroa*, or *tāruke*), which was lowered to the lake bottom and left there some time before being slowly raised. Kōkopu were sometimes also taken in these bundles, either deliberately or as by-catch.[119]

Bobbing (*toi*) involved attaching some sort of bait, usually worms, spiders, or small pieces of meat, to the end of a flax string which hung from the end of a short rod. The fish would seize the bait and could be lifted or slung out of the water. It was most commonly used to take non-migratory eels, but was sometimes used for other larger fish, especially kōkopu and papanoko. It could be done both by day and by torchlight on moonless nights. Even inexperienced Pākehā could usually catch several eels an hour this way, and practiced bobbers even more.[120]

Spearing was another method used to catch the larger fish, especially eels and flounder. Spears could be either single-pointed or multi-tined, the points being barbless; and they could be used by both day and by torchlight at night. The method itself was called *wero-tuna*, and the spear a *matarau* if it had several points or a *taotahi* or *pātia* if it had only one.[121] Another similar way of catching eels was by jagging or gaffing, where the eels were taken on a large curved hook attached to the end of a pole, the operator moving the pole up to the eel before quickly embedding

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[119] 'Access courses', p.39; Beattie Traditional Lifeways, pp.320,323; Best 'Food Products of Tuhoeland', p.77; Best The Maori Vol. II, p.415; Best The Maori as he was, pp.281-282; Curtis, p.169; Downes History and Guide, p.19; Downes 'Notes on Eels and Eel-Weirs', p.303; Fletcher, pp.260,263; Grace, pp.511,513; McDowall NZ Freshwater Fishes, pp.410-411; Makereti, p.239; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', pp.438,440

[120] Andersen, p.299; 'Access courses', p.39; Beattie Traditional Lifeways, pp.143,318-319; Best 'An Eel Fiesta', p.109; Best Fishing Methods, pp.121-122,154,217-218; Best 'Food Products of Tuhoeland', p.72; Best The Maori as he was, pp.270,275; Best The Maori Vol. II, pp.182,430,441,447; James Cowan The Adventures of Kimble Bent London: Whitcombe and Tombs, 1911, pp.94-95; Fletcher, p.260; Grace, p.511; Heaphy, p.195; McDowall NZ Freshwater Fishes, pp.412,415; Makereti, p.242; Poata, pp.16,18; Ranginui, p.34; Reischek, p.174; J.T. Thomson, p.329; Tikao, p.138

[121] Beattie Traditional Lifeways, pp.143,311,316,318; Best 'An Eel Fiesta', p.109; Best Fishing Methods, pp.55,126-127,153,226; Best The Maori Vol. II, pp.430,450; Best The Maori as he was, p.275; Curtis, p.169; McDowall NZ Freshwater Fishes, p.412; Poata, p.16; Ranginui, p.34; Tikao, p.138

the point in its body. This may well have been a method developed after the arrival of iron fishhooks, which would be much more suited to the purpose than wooden or bone ones.[122]

There were a number of ways of taking fish without any apparatus at all, although these usually required a degree of stealth and dexterity. Eels could be tickled or guddled, a method called *kaipara.*[123] When fish (usually eels, or sometimes kōura) were simply groped for in the water, in muddy bottoms, or under overhanging banks, this was called *rapu.* It was usually undertaken in the daytime, and could be done with either the hands or the feet. Kākahi were often take in shallow waters with a sandy bottom by feeling for them with the feet.[124]

Where fish travelled outside their watercourses, they could also be taken easily by hand. This usually occurred when migrating fish climbed up waterfalls while going upstream, or over gravel bars and the like when migrating to sea. The fish most usually taken while going upstream were lamprey and tunariki, which were pulled or swept from rock faces and waterfalls as they climbed them. There were well-known fisheries of this type in the Whanganui River and at Mataura.[125] Eels could be picked off in the same way from the wet gravel of bars closing off lagoons and river mouths as they sought to make their way to the sea. Simplest of all was the gathering of kōkopu or kōaro from the shores of Lake Taupō when vast shoals were washed ashore by strong westerly winds.[126]

Stretching the resource — preservation and development

Prior to the introduction of European food sources into New Zealand, there were limited sources of animal food available to Māori, and food of any sort could be scarce in winter in some

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[122] Best Fishing Methods, p.125; Poata, p.16; Ranginui, p.34

[123] Beattie Traditional Lifeways, pp.143,319

[124] ibid. p.319; 'Access courses', p.39; Best 'An Eel Fiesta', p.109; Best Fishing Methods, pp.113,124; Best 'Food Products of Tuhoeland', p.80; Best The Maori Vol. II, pp.417,430; Best The Maori as he was, p.275; Fletcher, p.263; Grace, p.514; Makereti, p.243; Poata, pp.16-18; Smart and Bates, p.30; Taiaroa 'Account on Gathering Eels', p.2

[125] Evidence of Hekenui Whakarake, Wanganui River Commission Proceedings, pp.U.5-U.6; Anderson Te Puoho's Last Raid, pp.37-39; Beattie Our Southernmost Maoris, p.61; Beattie Traditional Lifeways, pp.150-151; Downes 'Notes on Eels and Eel-Weirs', p.303; Mair 'Notes on Fishes in Upper Whanganui River', p.316; Todd, p.20

[126] Armstrong, p.92; Fletcher, p.261; Grace, p.512; Gaela Mair, p.22; Taiaroa 'Account on Gathering Eels', p.3

parts of the country. Therefore it was crucial to make food resources go as far as possible, which was achieved both by preserving food for later use, and by developing the resource through husbandry and transfer of species. As well as meeting the immediate subsistence needs of the community, preserved foods could be used to meet social needs through exchanges with other communities, and the hosting of feasts or *hākari*.

A number of methods were used to prevent spoilage, which took into account variations between species and the length of time the food had to be kept for. Drying was perhaps the most commonly used method, suitable as it was for most species. It was used especially for the massive autumn eel harvests, as all the eels could not possibly be consumed before they went off. It was also used for eels which were to be sent away as gifts or trade goods from regions which were noted for their eel fisheries, or which had to be transported from where they were caught back to permanent settlements elsewhere. The eels could either be skinned, split and cleaned before being hung to dry on a *whata* (drying rack), or dried whole in their skins which were then peeled off before consumption.[127] The drying could be done in a number of ways, including over a smoky fire, in the sun, or in the wind. When needed, the eels were either eaten as they were, or soaked in water and then cooked slowly over a fire or in a hāngi.[128] Fish other than eels which were dried or smoked included whitebait (which were laid out on special mats or pressed into blocks), kahawai (which enter many river mouths during summer), inanga, kōaro, and kōkopu. Kākahi were also shelled and hung on flax strings to dry in some areas.[129] Fish which had been properly dried would keep in this state for several years, and the technology allowed vast amounts of food to be distributed around the country — up to nine tons of inanga were sent away from

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[127] Wairarapa Lakes Commission Report, p.12; Adkin, p.19; Anderson Te Puoho's Last Raid, pp.20,29; Bagnall, p.377; Beattie Traditional Lifeways, p.316; Beattie 'Nature-lore of the Southern Maori', p.58; Brunner, pp.304-305; Curtis, p.169; Makereti, p.249; Ranginui, p.34; Reischek, p.174

[128] Andersen, p.307; Beattie Traditional Lifeways, p.144; Brunner, p.305; McDowall NZ Freshwater Fishes, p.413; Edward Shortland The Southern Districts of New Zealand London: Longman, Brown, Green & Longmans, 1851, p.199; Smart 'Notes (Putiki)'; Smart and Bates, p.35; Taiaroa 'Account on Gathering Eels', p.1

[129] Wairarapa Lakes Commission Report, p.19; Andersen, p.300; Beattie Maori Place Names of Canterbury, p.63; Beattie Traditional Lifeways, pp.140,308,312; Best The Maori Vol. II, p.449; Brunner, p.286; Burstall 'Trout Fishery', p.119; Fletcher, pp.261-264; Grace, pp.167,511-515; McDowall NZ Freshwater Fishes, p.414; Phillipps 'The Koaro', p.190; Te Rangi Hiroa The Coming of the Maori Wellington: Maori Purposes Fund Board, 1949, p.106; Taiaroa 'Account on Gathering Whitebait', p.2; Tikao, p.137; Muriwhenua Fishing Report, p.33; Ngai Tahu Report, p.152

Taumutu on Waihora (Lake Ellesmere) per annum, and annual eel catches of tens of tons were recorded at Wairarapa Moana.[130]

Fish were also sometimes cooked as a method of preservation, or were cooked in conjunction with some other method such as smoking for more long-term preservation. On the East Coast, upokororo were preserved by being grilled over embers and then packed tightly into baskets. Inanga and whitebait were also cooked in a hāngi and then compacted into baskets, a method which preserved them for several months. Tamati Poata recorded that eels were cooked before drying by grilling them on hot hāngi stones briefly then steaming them in the hāngi, and similarly, kahawai caught at the Whanganui mouth were steamed before drying.[131]

Another more distinctive Māori method of preserving fish was by potting them in their own fat, called *poha* or *huahua*, better known as a way of preserving muttonbirds (*tītī*) and other birds. It could only be used for fish with a high natural fat content, such as eels. Traditional *poha* were made from large kelp strands, which were carefully split and inflated to form a large bag, or from tōtara or rimu bark. These bags would then be packed with cooked eels and filled with the fat rendered from the eels before being sealed. Once potted, they would last almost indefinitely so long as they were not broached, and as they were also easy to transport they were a favoured trade or gift item.[132]

Eels and lamprey were also stored alive to provide a food supply outside of the main migration season. There were a number of ways of doing this, depending on the geography of the area involved, most of which utilized the fact that eels and lamprey taken during the migration period do not require feeding. In the Horowhenua and other coastal dune areas, eels were put into shallow lagoons with no sea access, from which they could be netted as required. Elsewhere, easily accessible artificial pits called *pārua* were dug which served the same purpose.[133] Corves (called *korotete*, *poha* or *hīnaki whakatikotiko*) were often used to store eels and lamprey in rivers

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[130] Wairarapa Lakes Commission Report, pp.12,19; Beattie 'Nature-lore of the Southern Maori', p.58; Gaela Mair, p.22; Poata, p.19

[131] Best Fishing Methods, p.42; Hector, p.129; McDowall NZ Freshwater Fishes, p.414; Poata, p.19; Power, p.78; Te Rangi Hiroa 'The Maori Craft of Netting', p.638; Shortland Southern Districts, p.199; Muriwhenua Fishing Report, p.33

[132] Andersen, p.307; Anderson 'West Coast, South Island', pp.107-108; Beattie 'Nature-lore of the Southern Maori', p.58; Coutts, p.145; Heaphy, p.238; McDowall NZ Freshwater Fishes, p.413

[133] Adkin, pp.19,236,293; Best Fishing Methods, pp.102,117; McDowall NZ Freshwater Fishes, p.413; Makereti, p.246

and other running water, a corf being a storage basket similar to a large *hīnaki*. They were used to keep large catches alive long enough to process them all, or to keep the fish as fresh food over a longer period. They could also be used to keep non-migratory eels, which were fed on potatoes in later days.[134]

More sophisticated pounds were to be found in some areas, particularly those where there was not a readily available supply of eels in the surrounding waterways. The remains of a system of eel pounds was found on the slopes of Mt Pirongia, at least a mile away from the nearest eel-stocked stream. A number of large wooden pens, approximately one metre by two metres, had been constructed in a small stream which had later silted up. Local Māori confirmed that this had been a common storage practice in earlier years. A similar stone trap existed at North Mavora Lake in Fiordland, whereby a natural stone formation was modified to form a large trap in which eels could be stored.[135]

Fishery development and the acclimatization of new species seems to have been an established part of Māori fishing practices. Oral traditions relating to both semi-mythical and more recent times square with the beliefs of Pākehā scientists that many bodies of water throughout the country were artificially stocked. Eels (and, less often, other species like the kōaro) were commonly released into waters that lacked them, although the repeated attempts made to stock Lake Taupō and Rotorua were always unsuccessful because once eels left to spawn at sea the young were never able to return over the Huka Falls and Okere Falls respectively.[136]

The volcanic explosions at Lake Taupō in A.D. 186 and in the Rotorua area in the eleventh or twelfth century A.D. (the Kaharoa series) would probably have wiped out most aquatic life in those areas, and the ecosystem was unlikely to have recovered fully by the time that

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[134] Best Fishing Methods, pp.164-165; Elsdon Best 'A Maori Korotete, or Corf' NZJST 6 (1923): 118-119; Curtis, p.168; Downes 'Notes on Eels and Eel-weirs', p.300; Firth Economics, p.285; McDonald, p.51; McDowall NZ Freshwater Fishes, pp.411,413,421; Mair 'Notes on Fishes in Upper Whanganui River', p.316; Marshall, p.66

[135] Beattie 'Nature-lore of the Southern Maori', pp.58-59; H.A. Swarbrick 'An Old Maori Eel Pound' JPS 67 (1958): 175-176

[136] Letter from Secretary of Marine to T.A. Strichen, 12/1/1950, M 1/7/5, N.A.; Memo from Secretary of Marine to Secretary of Department of Internal Affairs, 19/4/1951, ibid.; Andersen, pp.307-308; Burstall 'The Introduction of Freshwater Fish into Rotorua Lakes', pp.245-246; Fletcher, p.259; McDowall NZ Freshwater Fishes, pp.411,421; Sheppard and Walton, p.143; Strickland, pp.21-22

the first Māori explorers penetrated and began to settle these regions.[137] The introduction of fish into Lake Taupō is attributed by Ngāti Tūwharetoa to their *tupuna* Ngātoroirangi, one of the leading men of the Te Arawa *waka*. He travelled to the lake and, after making invocations to the god Ikatere, proceeded to stock it by tearing his cloak to shreds and casting the pieces upon the waters, whereupon they became inanga and kōkopu.[138]

Likewise, tradition records the efforts of Hatupatu, a famous Te Arawa *tupuna*, to introduce eels into Rotorua by bringing them to the lake packed in damp moss, although these all died after being scorched in a fire prior to their release, on the advice of a tohunga who wished to eat the eels himself. His attempts to bring marine snapper and kōura by human chains bearing gourds full of salt water also failed, but his introduction of kōaro from Rotoaira was a notable success. One of Hatupatu's relatives, Ihenga, is credited with the introduction of inanga and freshwater kōura into Rotorua from a lake in Northland, whence they were carried in gourds filled with water.[139] The examples of Ngātoroirangi and Hatupatu in particular highlight the important role played by the gods in fishing practices and the exercise of fishing rights. This connection of the gods with fishing practices was just one of the important social aspects of fishing.

The social significance of fishing

This thesis is not the place for a full exposition of the significance of fishing and other sorts of resource use in the Māori lifestyle, but some important themes should be noted. Most obvious is the importance of fish as a food source. Good supplies of food, especially food that would keep for some time, were important not only for subsistence, but to allow for the gifting or exchanging of locally available food for other goods from elsewhere. As well as sending food away, sufficient stocks were needed to provide hospitality for visitors. The ability to lay on lavish feasts or *hākari*, and to provide fitting entertainment for guests, was important in maintaining the mana of the community and the wider hapū and iwi. At the same time, the gathering of

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[137] Burstall 'The Introduction of Freshwater Fish into Rotorua Lakes', p.245; McDowall NZ Freshwater Fishes, pp.421-422

[138] Grace, p.61; Samuel Locke 'Historical Traditions of the Taupo and East Coast Tribes' TPNZI 15 (1882): 433-459, p.435. See pages 274,276 *infra*.

[139] Mair Reminiscences and Maori Stories, pp.41-44; Shortland Maori Religion and Mythology, pp.85-87; Strickland, pp.22,25

the food for the *hākari* demonstrated and reinforced the right of the community to use those food resources.

Most modern scholars and earlier Pākehā observers of Māori society have recognized the importance of fisheries compared with land-based animal resources. Many have remarked upon the difference between Pākehā and Māori perceptions of land and resources — the European perception was that cultivation would almost always take precedence over other forms of resource exploitation as an indication of ownership, while in many parts of New Zealand this was not the case because of the limitations of land-based food resources compared with the richness of the aquatic resource.[140]

Māori trade and exchange practices reflected a range of social contacts, from the goodwill gifts made between closely related groups to the more commercial transactions made between more distant tribes. Surplus catch was often sent away to family members or friends living outside the immediate area. For example, a Pākehā farmer who had lived most of his life at Jerusalem told the Wanganui River Commission in 1950 of his memories of the late nineteenth century Whanganui lamprey fishery:

> I do not think it gave the Maoris greater pleasure than to have a record catch and send sacks and sacks away outside to their friends. That was the Maoris' ambition. I know I have seen the catches on the river and seen the eels being sent away.[141]

Māori writers especially have emphasized the importance of exchanging aquatic products and other resources in strengthening the bonds of *whanaungatanga* or family relationships which bind together Māori society. Such resource gifts or exchanges were typically of mutual benefit, and in those cases where coastal people were able to offer kaimoana in return for preserved eels and the like from inland tribes, these exchanges served a secondary function in providing variation to the diet of the other. These transactions did not always take the form of a straight trade, but were rather gifts given in expectation of a roughly equivalent if unsolicited return, in accordance with

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[140] Despatch from Governor Grey to Earl Grey [Secretary of State for the Colonies], 7/4/1847 in Great Britain Parliamentary Papers: Papers Relating to New Zealand Shannon: Irish University Press, 1969, vol. 6 pp.16-17; Andersen, p.308; Coates, p.3; Cowan The Maori Yesterday and To-day, p.182; Marshall, p.71; Te Rangi Hiroa 'The Maori Craft of Netting', p.597; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', pp.437-438; Strickland, p.21; Muriwhenua Fishing Report, pp.xiii,33,200

[141] Evidence of Albert Edward Davey, Wanganui River Commission Proceedings, p.2C.2

the key Māori economic principle of *utu* or reciprocity. When a gift was given, the recipient was under a social obligation to return the compliment, and risked loss of mana if this was not done.[142]

The importance of this aspect of Māori fishing is indicated by its survival into modern times, as explained by Julie Ranginui, a Whanganui fisherwoman working the river at Matahiwi a century after the "sacks and sacks" of lamprey were sent away:

> Eel would last a long time this way [preserved in their own fat] and was available as a food store both for the fishing people concerned, for their hapu and more distant people, inland and as far away as Ohakune, who in the past reasonably expected a regular distribution of eel to supplement their diet.[143]

The 'past' she refers to is not that of previous generations, but of the fifteen years or so previous to her statement, when river flow changes began to affect the Whanganui River fishery.[144] Yvonne Marshall's account of another modern eel fishery at Kawakawa in Northland also documents the obligations of those working large-scale eel fishing operations:

> Gifting obligations can be many and varied. They range from small gifts given to close family whenever eels are cooked or those given to relatives and friends when up visiting from Auckland, to the massive obligation of supplying eels for weddings, funerals, and other *hui* which take place frequently on the local *marae*. First priority invariably goes to the elders.... The concepts of generosity and abundance are inextricably linked. If a man's family engages in eeling he is socially obliged to give away eels.[145]

Fish was also used as a barter item in more distant trade transactions. Dried eels especially were sent over great distances, much of the Wairarapa eel harvest being sent throughout the North Island in exchange for goods unobtainable locally, and similar exchanges took place in other areas where particular species were caught in great numbers. It is recorded by numerous observers that inland tribes throughout the country routinely exchanged freshwater fish and forest produce for marine fare or other *taonga* such as *pounamu* from the South Island or *kōkōwai* (red ochre).[146]

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[142] Goodall, p.33; Pat Hohepa 'The Indigenous View on Kaimoana' in R. Walker (ed.) Report of the Seminar on Fisheries for Maori Leaders, p.3; Makereti, p.249; Marshall, pp.71-74; Rawiri Te Maire Tau Kurakura Ngai Tahu M.A. Thesis, University of Canterbury, 1992, pp.162,176-186; Muriwhenua Fishing Report, pp.50-52,179

[143] Ranginui, p.34

[144] See page 352 *infra*.

[145] Marshall, p.73

[146] Wairarapa Lakes Commission Report, p.12; Bagnall, p.377; William Colenso 'On the Maori Races of New Zealand' TPNZI 1 (1868): 339-424, pp.354-355; Hamilton, p.68; Hohepa, p.3; Gaela Mair, pp.22-23; New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te

Food surpluses or even valuable winter subsistence food supplies were also used for status-enhancing and competitive purposes in the staging of feasts (*hākari* or *kaihaukai*), at which large platforms or stages were erected and piled high with many varieties of food. Sometimes these *hākari* were held to celebrate an important occasion such as a chiefly birth or marriage, but regardless of whether they were staged as a celebration or held for their own sake, an important effect was to impress upon the invited guests the wealth and standing of the tribe able to provide such a magnificent feast. The ability to provide and present guests with food of great quantity and quality was important in establishing and maintaining both the status and mana of the organizing group, and the social links between the hosts and the guests. *Hākari* also indicated the strength of the *manaakitanga* or hospitality of the hosts. It was also important for the mana of the recipients that they should be able to respond with a feast at least as good, or preferably better, at some point in the future.[147]

The unopposed assemblage of the vast amounts of food needed to provide such hospitality was also a very public demonstration of the right of the hosts to exercise resource rights over the land and waters the food was gathered from, and by sharing in the feast the recipients tacitly acknowledged this.[148] The food served up would include local delicacies, and was intended to be of sufficient volume to far exceed the immediate needs of the guests — over twenty thousand dried eels were produced along with tons of marine fish at a *hākari* given by Te Waharoa in Tauranga in the 1830s, and four thousand baskets of dried kōura and inanga were served at a hui in Rotorua in 1873.[149]

The relationships between people and the gods, and the living and those who had passed on, were a central part of Māori society. Māori did not see their day-to-day existence as

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Tiriti o Waitangi Wellington: Law Commission, 1989, pp.34-35; Tau, pp.181-183,185; Muriwhenua Fishing Report, pp.xv,45,51-52

147 Beattie Traditional Lifeways, p.278; Heaphy, p.238; J. Prytz Johansen The Maori and his Religion in its Non-ritualistic Aspects Copenhagen: I Kommission Hos Ejnar Munksgaard, 1954, pp.112-113; Mair Reminiscences and Maori Stories, p.7; Ann Parsonson 'The Expansion of a Competitive Society: A Study in Nineteenth-Century Maori Social History' NZJH 14 (1980): 45-60, pp.51-52; Tau, pp.166-167,176-180; Te Whakatau Kaupapa, p.3-14; Richard Taylor, p.169; Tikao, p.130; Waitangi Tribunal Report of the Waitangi Tribunal on the Motunui-Waitara Claim (Wai 6) Wellington: The Tribunal, 1989, p.8; Muriwhenua Fishing Report, p.200

148 Parsonson 'The Expansion of a Competitive Society', p.52; Te Whakatau Kaupapa, p.3-11. See for example page 282 *infra*.

149 Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', p.451; Muriwhenua Fishing Report, p.68

separated off from the gods and the ancestors, but rather in intimate contact with them. Thus, as in all other aspects of the traditional lifestyle, spiritual beliefs and practices were central to the everyday exercise of fishing rights. Natural resources were regarded as the property of the gods, and were under the stewardship of the people rather than in their absolute ownership in the Western sense. These resources were only able to be used through the favour of the gods; in the case of freshwater fisheries the primary god was Tangaroa, known throughout Polynesia as god of the sea, rivers, and fishes. Due observance of the correct rituals and sustainable use of and respect for the resource were necessary to guarantee the ongoing availability of fish. While freshwater fishing seems to have been a less tapu occupation than sea fishing, there was still a degree of ritual attached to freshwater fishing pursuits. *Karakia* (prayers or invocations) would be offered to the appropriate god or gods to request good fishing. These *karakia* ranged from the simple invocations known to all the people, to the specialized rituals and propitiatory rites known only to those tohunga connected with Tangaroa.[150]

Ārama Tinirau, a witness in the Native Land Court in Whanganui in the late nineteenth century, spoke of ritual observances relating to kūmara cultivation and eel fishing at Tawhitinui, near Jerusalem:

> ...in cultivating Kumara, as soon as the first shoots appear above ground they were picked and taken to tuahu sacred place where certain ceremonies were performed, to insure a good & plentiful crop. Then again when the time came to use the eel weirs, the vines that were used in binding the weir posts & perform [sic] ceremonies over them in the same way. The Tohungas were Mawai, Tinirau No. 2, Korokeke, Pairai father Materei & Poutata in their generations. A totara post used to mark the spot & the first fruits of the season of Kumara or eels were hung up there, these offerings were made to Gods Maru & Rongomatane, their blessings were invoked. Maru was the god of the water & Rongomatane of the land.

He also spoke of the consequences if the gods were not respected:

> A song was made about a man named Weka — who neglected to make offerings of first catch of eels to the god — the man was killed & his head stuck up on a lance wood tree, all this is mentioned in the song which is a very old one.[151]

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[150] Wharawhara Topine, Whanganui River Bed Hearing, 3/11/1938, Wanganui MB 99 p.264; Best Fishing Methods, pp.2-3; F. Allan and Louise Hanson Counterpoint in Maori culture London: Routledge and Kegan Paul, 1983, pp.58-60; James Irwin An Introduction to Maori Religion Bedford Park, SA: Australian Association for the Study of Religions, 1984, pp.5-6,23-28,35-36,43-45; Maori Marsden 'God, Man and Universe: A Maori View' in Michael King (ed.) Te Ao Hurihuri: Aspects of Maoritanga Auckland: Reed Books, 1992, pp.123,128-130; Muriwhenua Fishing Report, pp.47,179-180,200; Ngai Tahu Sea Fisheries Report, p.98

[151] Arama Tinirau, Tawhitinui hearing, 25/6/1900, Wanganui MB 45 p.207

it was necessary to remove from the community and make an example of members who might bring disaster to all by failing to maintain the goodwill of the gods.

In the freshwater fishery, highly tapu rituals such as those discussed by Ārama Tinirau attached mostly to the larger scale fisheries such as the capture of migratory eels and lamprey. However, certain basic rituals were also observed in connection with everyday fishing trips, to guarantee good catches. People continued these rituals into the contact era, seeking the goodwill and approval of the newly-adopted Christian God through the use of hymns and prayers. There were also special codes of behaviour relating to fishing practices and fish caught from certain areas which imply a particular tapu applied to those areas, in order to protect the *mauri* or 'life-force' of the fishery.[152] Pākehā scholars have recorded a number of these rituals and restrictions associated with particular fisheries. Papanoko caught in Hawke's Bay were never taken into a pā, but were always cooked outside, as to do otherwise would jeopardize further catches and bring on disaster. Eels taken at Rotoiti near Upokongaro in the Whanganui district were not to be killed in that locality lest a gale arise and put a stop to fishing. A number of restrictions applied to eel fishing in the region of Hokitika and Okarito, including the ritual washing of hands before and after the capture and consumption of eels, the use of a special tinderbox to light the cooking fire, and not drinking directly from a container dipped in the fishing stream.[153]

As freshwater fishing was a safer occupation than sea fishing, it was subject to a lesser degree of tapu and associated ritual. Women could be more involved, as their lives would not be put at risk, nor would they risk the lives of others by infringing tapu. Women's involvement in dangerous activities was restricted in this way not because they were considered too delicate or incapable of hard physical work, but because hapū and iwi recognized that women were vital to their collective strength as mothers of the next generation and consequently their lives were valued. Women were not however free to participate in all aspects of freshwater fishing, as they were still restricted from taking part in operations such as the construction of weirs or large nets, and the use of large canoes, which attracted a greater degree of tapu because of their importance to the community. Women and children did however have an important part to play in the

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[152] Best Fishing Methods, pp.1,107,127-131,218-222; Craig, p.188; Hanson and Hanson, pp.62-65; Heaphy, p.195; Irwin, pp.21-29,62-64; Ngai Tahu Sea Fisheries Report, p.xv

[153] Phillipps 'Notes on the Fresh-water Fish Papanoko', pp.167-168; Maxwell Smart 'Upokongaro Notes', Alexander Turnbull Library MS-Papers 1008:15; Brunner, pp.274-275

gathering of smaller species, often using different methods from the men. It is recorded that while women did most of the fishing for kōkopu, men also helped but used different nets to do so.[154]

The imposition of a *rāhui* or prohibition over a fishing area also reflected the spiritual side of fishing. The imposition of *rāhui* was a manifestation of the mana of the chief who did so, and mana was effective as a social force because it was derived from the gods. As *rāhui* were used to prevent the depletion of a resource, they were also a reflection of the role of the gods in providing food resources. For a chief to fail to protect a resource under his stewardship would have been to show disrespect for the gods, for the ancestors who had guarded the resource before him, for the people of his tribe yet unborn, and for his own personal standing and mana. *Rāhui* were also imposed where the waters had been made tapu by a death or other misfortune, so as to prevent people from coming to harm from polluting themselves by eating fish or other produce which had come from such waters. Sometimes a *rāhui* would be declared, not because of depletion or pollution, but to publicly mark the resource as under the control or protection of the person imposing the *rāhui*. Retribution for ignoring a *rāhui* would come not only from the gods, but also from those in charge of the resource, whose mana had been impugned.[155]

While this thesis is concerned primarily with the exercise of fishing rights, that is, with an examination of the 'rules' under which freshwater fishing was undertaken, some knowledge of fishing practices and the social context is necessary to put these fishing rights within an overall framework of Māori freshwater fishing. When examining, for example, the right of a particular hapū to take eels from a particular stretch of river, it is evident that a number of factors influenced the exercising of that right. The efficacy of the available technology was important, for if it was a right held in common by a number of people, then the catch had to be sufficient to satisfy all those people. There would also be differences in the exercise of rights in those fisheries either

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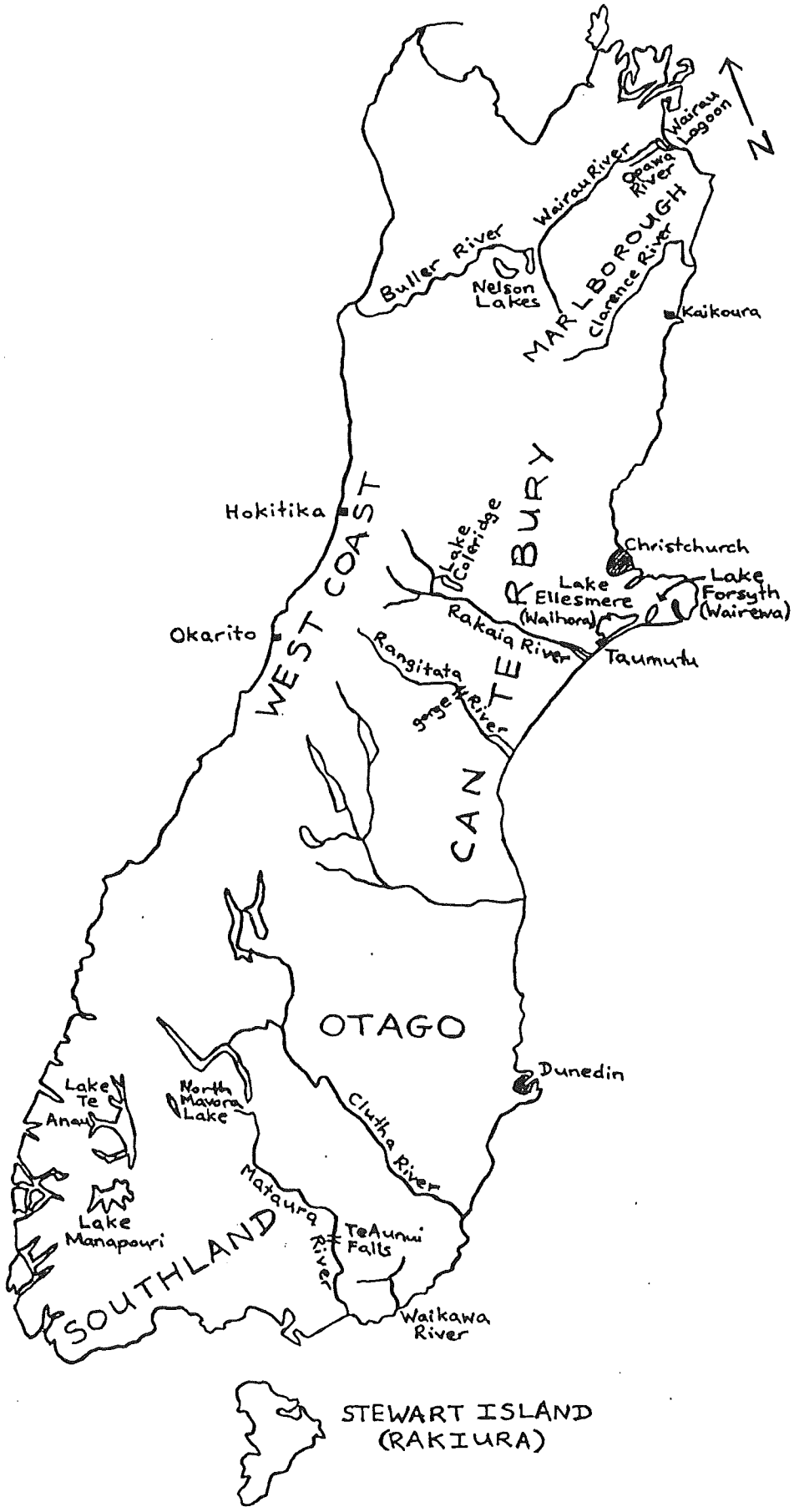
[154] Andersen, p.299; 'Access courses', p.39; James Belich Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century Auckland: Allen Lane/The Penguin Press, 1996, pp.103-105; Best 'Food Products of Tuhoeland', pp.72-73; Irwin, pp.26-27; Te Rangi Hiroa 'The Maori Craft of Netting', p.599; Te Rangi Hiroa 'Maori Food-supplies of Lake Rotorua', pp.441-442; Ranginui, pp.34-35; Muriwhenua Fishing Report, p.33. James M. Acheson, drawing on the work of the noted anthropologist Bronislaw Malinowski, suggests that one of the factors determining the degree of "magic" or ritual pertaining to any activity was the risk involved. Thus sea fishing, being very dangerous, was much more surrounded with ritual than, in his example, lagoon fishing. 'Anthropology of Fishing' Annual Review of Anthropology 10 (1981): 275-316, pp.287-288

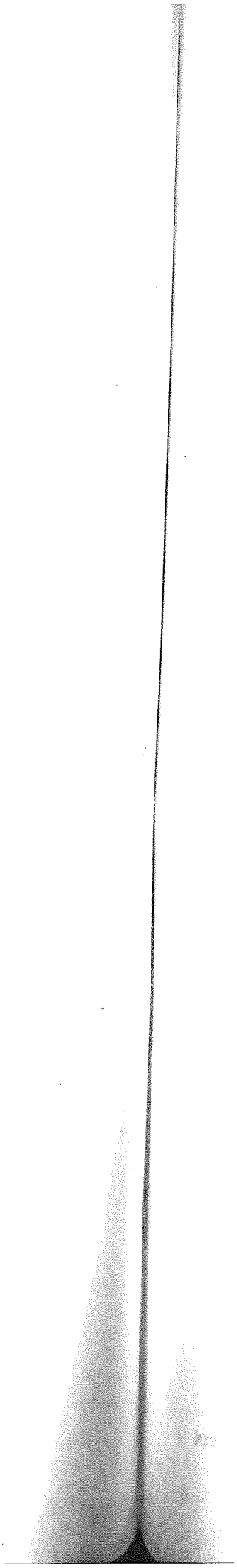
[155] Best Fishing Methods, pp.89,226; Firth Economics, pp.259-262; Makereti, p.245; Skinner, p.107; Muriwhenua Fishing Report, pp.33,198-199. See pages 323,397 *infra*.

open or closed to women because of the degree of tapu surrounding them. The life cycle of the species being taken was also important, as rights would be exercised differently when the particular fish was available all year round, or only in particular seasons.

It has been necessary to explain the wider social significance of freshwater fishing rights in order to understand why these rights had a value to Māori, and therefore why the study of these rights is a productive exercise. One of the reasons Māori continue to fight for the recognition of their freshwater fishing rights, even though the resource is now badly degraded, is that fishing had and continues to have an importance beyond its vital fulfilment of everyday needs. Freshwater fisheries were immensely valuable because they provided the largest and most reliable source of animal food to inland tribes. However, beyond subsistence the fisheries provided food to be exchanged with neighbours and more distant peoples, serving both an economic function by allowing the exchange of goods, and an equally important social function by binding people together and creating mutual obligations through the operation of *utu* or reciprocal dealings. The social function of fishing was also seen in the provision of food for *hākari* or feasts, which also served to strengthen the bonds of *whanaungatanga* or kinship whilst at the same time providing an opportunity for the display of mana through the lavish hospitality or *manaakitanga* provided for the *manuhiri*. The wider importance of fishing also went beyond these socio-economic concerns. Fishing was also closely bound up with the spiritual side of the world, and there was always an intimate connection between the gods who provided the fish and the people who caught them and managed the resource. This close relationship between the gods and the people was always a major influence on the ways in which fishing rights were exercised in practice.

Map 1 b) South Island — places mentioned in Part One





PART TWO

The Case Studies

CHAPTER FIVE

The Wairarapa Moana Fishery

Those Weirs at Wairarapa do not only belong to two persons - but to us all... the entrance to the Wairarapa river is for all who wish to make an Eel fishing settlement.[1]

The Wairarapa Moana district

Lakes Wairarapa and Ōnoke, also known as Wairarapa Moana, lie near the shores of Palliser Bay, between the Rimutaka and Aorangi Ranges. The whole area is one of great instability, prone to violent seismic upheaval from a major fault line which runs along the western shore of Lake Wairarapa. Both the lakes are very low-lying, with Lake Wairarapa currently only 1.5 metres above sea level and only one or two metres deep, despite being 10 kilometres inland. Lake Ōnoke is separated from the sea by only a shingle bar; and so the lake system and its associated fisheries are extremely vulnerable to environmental change. Lake Wairarapa, also sometimes referred to as the upper lake, is fed by two major tributaries, the Tauherenīkau and the Ruamāhanga. The Tauherenīkau flows into the north of the lake from the Tararua Range, while the Ruamāhanga flows down a wide valley between the two ranges. It flows parallel to the upper lake before turning into its south-east corner; it then leaves Lake Wairarapa and links it to Lake Ōnoke. The hills come close to the western shore of both lakes, but the area to the east and between the lakes is low-lying and interspersed with swamps. These swamp areas were even more widespread before the 1855 earthquake and lake drainage works.

The lake system has been in a state of almost constant change for thousands of years. It was originally a large estuary stretching much further inland than the current lake, but was blocked off from the sea by shingle washed down the Ruamāhanga before the arrival of the Māori in New Zealand.[2] Since that time, the lake has continued to fill in with gravel from its feeding

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1 Raniera Te Iho to Mr. Halse, Native Department, 24/6/1876, in Māori Affairs Department file MA 13/97, National Archives.

2 D.J. Lowe and J.D. Green 'Lakes' in J.M. Soons and J.M. Selby (eds) Landforms of New Zealand 2nd ed. Auckland: Longman Paul, 1992, p.128

rivers. This process has been accelerated both by bush clearing and accidental fires started by the early Māori settlers[3] and the two major earthquakes to strike the area over the last thousand years. The first of these occurred *circa* A.D. 1460, and is recorded in Māori oral tradition. The Government Agent in the Wairarapa, E.S. Maunsell, reported in 1875 that "old natives say that during the times of their forefathers the Lake was not closed, until a violent earthquake caused an upheaval which closed it."[4] Geological evidence shows that it caused the area to be lifted considerably, which may well have completed the transition from estuary to lake. This would have had a drastic effect on the lake fishery, as marine fish were replaced by freshwater species.[5]

Some idea of the impact may perhaps be gauged from the effects of the 1855 earthquake, which was of similar magnitude. This caused Turakirae Head at the west of Palliser Bay to be lifted 2.7 metres, with similar effects being felt in the Wairarapa Valley itself. The most immediate effect of this was to partially drain the lake. Many of the swampy fringes and pools around the lake, which contained extensive eel fisheries, became dry land or unsuitable for fishing.[6] The rivers flowing into the valley were also altered drastically. Before the earthquake the Ruamāhanga and Tauherenīkau Rivers had been broad and deep, and the lower Ruamāhanga had been navigable, providing access to the upper lake from the sea.[7]

The most consequential effect of the 1855 earthquake was to complete the closure of the bar separating Lake Ōnoke from the sea. It had often been open at some stages beforehand, allowing canoe access to the lake.[8] After the earthquake, the bar closed completely for several months during the summer and autumn as rainfall was lower and storms in Cook Strait were less frequent. The lake would rise about four metres during autumn, joining Lake Ōnoke to Lake Wairarapa and backing up the Ruamāhanga as far as the modern town of Martinborough, until

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3 Janet Davidson 'The Polynesian Foundation' in W.H. Oliver (ed.) The Oxford History of New Zealand Auckland: Oxford University Press, 1987, p.7

4 E.S. Maunsell to Native Department, 24/3/1875, NO 75/1241, MA 13/97, N.A.

5 B.F. and H.M. Leach Archaeology in the Wairarapa Dunedin: University of Otago Department of Anthropology, 1969, p.14; P.J.J. Kamp 'Landforms of Wairarapa: A Geological Perspective' in Soons and Selby, p.367

6 'Claims of Natives to Wairarapa Lakes and Adjacent Lands — Report by Mr. Commissioner Mackay' AJHR 1891 G-4, p.19; Leach and Leach Archaeology in the Wairarapa, p.14

7 Angela Heather Ballara The Origins of Ngāti Kahungunu, unpublished Ph.D. thesis, Victoria University of Wellington, 1991, p.40

8 ibid.

the pressure of the water forced the bar open again in April or May.[9] This cycle coincided with the migratory patterns of the eel, the most valuable food source for the Wairarapa Māori in pre-contact times. The autumn rains which contributed to the lake opening also carried the eels downstream on their annual migration, so Māori were able to take vast hauls of eels as they gathered behind the bar waiting for access to the sea. They were also able to make use of the lake waters as they backed up the streams in summer and early autumn, by constructing weirs and traps to take the eels as they moved further up the waterways.[10] A seasonal eel fishery at the lake mouth had existed before the earthquake, but it afterwards became more reliable as the bar was regularly closed.

The Wairarapa fisheries

As explained above, the species available from the lakes and rivers in the Wairarapa would have varied over time due to the unstable nature of the region. However, it seems likely that eels have constituted the largest part of the food resources available from the waters for the whole period of human occupation, especially in periods of climatic deterioration such as those which occurred in the fifteenth to seventeenth centuries.[11] References to eel fisheries made in the Native Land Court far outnumber those to all other sources of food combined, and all were agreed that the eel fishery was the most vital resource in the lake and surrounding areas.[12] The secondary food sources mentioned include other fish species such as flounder, inanga and kōkopu; as well as ducks, pūkeko (swamp hens) and other aquatic birds. These were often exploited in the seasons when fresh eel meat was not available.[13]

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9 Wairarapa Commission Report, pp.5,12; Lowe and Green, p.128

10 Evidence of Ahitana Matenga, Tipua Mapunatea Hearing [TMH], 8/3/1890, Native Land Court Wairarapa Minute Book [MB] 13, p.171; Wairarapa Commission Report, pp.5,12,19

11 B. Foss Leach 'The Prehistory of the Southern Wairarapa' Journal of the Royal Society of New Zealand 11 (1981): 11-33, pp.28-29

12 Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.239; Wairarapa Commission Report, pp.3-6

13 Paraone Pahoro, Wairarapa Moana Hearing [WMH], 8/11/1883, MB 4 p.117; Hohepa Aporo, TMH, 23/10/1888, MB 9 p.437, 27/10/1888, p.489; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.518; Hemi Epanaia, TMH, 5/12/1888, MB 10 pp.276-277; Ahitana Matenga, TMH, 7/3/1890, MB 13 p.160; Wairarapa Commission Report, pp.5,12,19

Little mention is made in the Land Court records of early fishing practices, except to prove constant use from the time of an early ancestor, or to illustrate incidents relating to land tenure. Much more comprehensive evidence was given regarding fishing practices over the three or four generations prior to the hearings. The eel fishery could be divided into two parts — the mass capture of migrating eels as they gathered at the outlet of Lake Ōnoke in autumn, and the numerous small-scale fisheries which were operated in the upper lake and in the rivers, streams and pools fringing the lakes, especially on their eastern shores. These lake fringe fisheries will be dealt with in the next chapter. The main fishing season at the lake mouth was from February to May, especially the latter two months when people gathered from all over the district at the lake mouth to catch the choicest *hao, te heko,* and *kōkoputuna* (migrating eels) and other fish. The eels were caught at the lake mouth by means of large *hīnaki* or woven eel pots set at weirs and stakes at the mouth. They could also be picked off by hand as they attempted to slither across the gravel at night to reach the sea; or trapped by the *kōumu* method, whereby ditches were dug into the bar, into which the eels swam in search of salt water and became trapped. The annual yield at the lake mouth could be as much as thirty tons.[14] In contrast to the lake fishery, the swampy area to the east could be fished all year round, using methods more suited to a smaller scale operation. The upper lake was fished in a similar way, with nets and *hīnaki* being set to catch eels and other fish as they swam around the lake. As there was no current to carry fish into the *hīnaki*, they would usually be baited and set at posts or on lines.[15]

The value of the fishery did not lie solely in its importance as a food source. Wairarapa Māori caught more eels than they could possibly eat, and the dried excess provided their only major trade goods. Dried eels and other fish could be exchanged with other tribes in return for goods unobtainable in the Wairarapa Moana area, such as *pounamu* from the South Island, or salt-water fish from their neighbours on the coast. In later days eels were exchanged for clothing and blankets.[16] These gift exchanges were not only carried out by hapū, groups of hapū, or

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[14] Hohepa Te Wakiumu, TMH, 17/10/1888, MB 9 p.404; Wairarapa Commission Report, pp.5,12,19,28; Piripi Te Maari and others to Native Minister, 29/10/1886, NLP 86/467, MA 13/97, N.A.; Gaela Mair 'Maori Occupation in the Wairarapa in the Protohistoric Period' in B. Foss and Helen M. Leach (eds) Prehistoric Man in Palliser Bay Wellington: National Museum of New Zealand, 1979, p.22

[15] See pages 228-229 *infra*.

[16] Hohepa Aporo, TMH, 26/10/1888, MB 9 p.478; Wairarapa Commission Report, pp.19,27-28,33

communities, but also by individuals. Certain eeling areas on the Tipua Mapunatea block were claimed by the Ngāti Rakairangi hapū, one of the grounds of their claim being that Te Retimana Te Ruahi of their hapū had caught eels there and exchanged them with others living nearby for food and clothing.[17]

Māori occupation and control of the Wairarapa district

Archaeological evidence shows that there were a number of small settlements along the Palliser Bay coast as early as A.D. 1050, populated by groups which had recently arrived from further north and which subsisted largely on kūmara as well as seafood.[18] Their identity is disputed, being given variously a Te Tini-o-Awa, Ngāti Mamoe, and Waitaha; with older writers referring to them more loosely as the Moa-Hunters (a misnomer in the Wairarapa region, where moa were not hunted).[19] These original inhabitants were superseded by Rangitāne and their Ngāi Tara relatives, who traced their descent from Whātonga, one of the captains of the Kurahaupō *waka*. The descendants of Whātonga's son Tara and his grandson Rangitāne spread to occupy the south-east of the North Island, from Hawke's Bay to Wellington.[20] Even though some battles occurred between the tāngata whenua and the Rangitāne new-comers, this process does not necessarily imply that the newcomers exterminated the earlier group or forced them to move away. Old bloodlines may well have continued under a new name, and Whātonga's descendants became the key ancestors from whom whakapapa and kinship links were traced.[21]

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17 Hohepa Aporo, TMH, 23/10/1888, MB 9 p.440, 26/10/1888, p.478; Apiaha Hakiaha, TMH, 29/10/1888, MB 9 p.502

18 Davidson, pp.9-10; Leach 'The Prehistory of the Southern Wairarapa', pp.25-27

19 G. Leslie Adkin 'Archaeological Evidence of Former Native Occupation of Eastern Palliser Bay' JPS 64 (1955): 450-480, pp.453,477-478; Davidson, p.10; S. Percy Smith 'The Occupation of Wai-rarapa by Ngati-Kahungunu' JPS 13 (1904): 153-165, pp.153,156. This article by Smith was largely based on material given to him by Hoani Paraone Tunuiarangi, a chief of the Ngāti Kahukuranui and Ngāti Rakairangi hapū of Ngāti Kahungunu, and so is biased strongly in favour of those tribes. See Steven Chrisp 'The Maori occupation of the Wairarapa: Orthodox and Nonorthodox Versions' JPS 102 (1993): 39-70, pp.47-51.

20 J.M. McEwen Rangitāne: A Tribal History Auckland: Heinemann Reed, 1986, pp.12,15,18,21,24,26-27

21 Ballara, p.15

The Ngāti Kahungunu people followed a similar path into the Wairarapa. According to one account, Whātonga invited Tamatea of the Takitimu *waka* to live within the boundaries of his people, which stretched from Wairoa to Wellington. Tamatea then called for his son Kahungunu to join him, and Kahungunu settled eventually at Nukutaurua, on the Mahia Peninsula.[22] The movement southwards into the Heretaunga (Hawke's Bay) district came in the time of Kahungunu's grandson Rākaihikuroa (probably *circa* 1500-1525), who moved south with his family into Rangitāne territory, where they were granted land to live on by the Rangitāne chief Orotu.[23]

Once established in Heretaunga, the Ngāti Kahungunu lived peacefully alongside the Rangitāne until the mid seventeenth century, when a family dispute caused a migration. Hineterangi, a high-ranking woman of Ngāti Kahungunu and Ngāi Tara, had a fight with her brother Rākaiwerohia over the ownership of a kūmara patch, and Rākaiwerohia was killed. He had been married to Hinetauira, sister to Te Rerewa, the Rangitāne chief of the Wairarapa district. It was this connection that led Rākaiwerohia and Hinetauira's son Te Rangitāwhanga to go to his maternal uncle, accompanied by a number of his paternal uncles and other relatives.[24] In terms of most later claims to land and fishing rights in the Wairarapa, this is the key group of ancestors, and most sources agree on the composition of the party. As well as Te Rangitāwhanga, there were his paternal uncles Tuputa, Tutemiha, Tukaiora and Paroa; his cousins Pōuri, Nuku and Hamiti (all brothers, also distantly of Rangitāne descent) and Rakairangi; and Kariwhare and a few others mentioned by some but not all people. They were all of predominantly Ngāti Kahungunu descent.[25] Thus while Te Rangitāwhanga was not the most senior of the migrants in terms of his Ngāti Kahungunu ancestry, his Rangitāne parentage gave him the status of nominal head of the migration.

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[22] T.W. Downes 'History of Ngati-Kahu-Ngunu' JPS 23 (1914): 28-33,111-125, 24 (1915): 57-61,77-85,121-129, 25 (1916): 1-8,33-43,77-88, vol. 23 pp.116-118

[23] ibid. vol. 24 p.60

[24] Kahu o te Rangi, TMH, 3/10/1888, MB 9 p.209; Hohepa Te Wakiumu, TMH, 15/10/1888, MB 9 p.363; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.523; Piripi Te Maari, TMH, 2/11/1888, MB 10 p.1; Wi Hutana, TMH, 17/11/1888, MB 10 p.107; McEwen, p.74; Gaela Mair, p.12; S.P. Smith, pp.159-160

[25] Piripi Te Maari, WMH, 10/11/1883, MB 4 p.123; Manihera Rangitakaiwaho, ibid. pp.123-124; Kahu o te Rangi, TMH, 3/10/1888, MB 9 p.219; Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.223; Hohepa Aporo, TMH, 23/10/1888, MB 9 p.435; Wi Hutana, TMH, 13/11/1888, MB 10 p.54

On their arrival at the mouth of Lake Wairarapa, Te Rangitāwhanga found Te Rerewa himself preparing to migrate with followers to the South Island.[26] Te Rerewa agreed to exchange carefully defined lands in the district for the canoes that Te Rangitāwhanga's group had arrived in, plus some others that they would construct. The large tract obtained was then divided amongst the various leaders of the migrant group.[27] Eruera Rangitakaiwaho described this transaction as 'utu': "The utu given to Te Rerewha was a canoe (Tahatu) — the land received for it commenced at Tiakipuku to Waiohine." Elsewhere, where his testimony was translated completely into English, his *take* was described as "the purchase" and alternatively he stated that "the land was given by Te Rerewa." Others also described the transaction variously as a purchase or a gift exchange.[28]

This process was known elsewhere as *tuku whenua*, and according to Margaret Mutu, it usually conveyed a meaning of allocation or release rather than sale.[29] The land remained under the mana of the original owners and reverted to that tribe and *rangatira* if the grantees and their descendants no longer chose to stay on the land, or breached any of the conditions of the grant. The transaction was usually marked by *tohu*, or symbols of the transaction, such as the passing over of a cloak or *mere* (stone club). When the land reverted, these *tohu* would also be returned.[30]

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[26] Foss Leach has suggested that Te Rerewa's migration may have been prompted in part by a sustained period of cool weather, making cropping difficult. The archaeological evidence suggests that the area was almost deserted for a short time around this period, as the population gradually moved away. Leach 'The Prehistory of the Southern Wairarapa', pp.28-31

[27] Eruera Rangitakaiwaho, TMH, 27/9/1888, MB 9 p.170, 4/10/1888, p.222, 5/10/1888, pp.255-256, 8/10/1888, pp.279-280, 10/10/1888, p.312; Hohepa Aporo, TMH, 27/9/1888, MB 9 p.175, 23/10/1888, pp.435-436; Apiata Hakiaha, TMH, 29/10/1888, MB 9 pp.501,522-523; Piripi Te Maari, TMH, 2/11/1888, MB 10 p.3, 6/11/1888, p.47; Wi Hutana, TMH, 13/11/1888, MB 10 pp.54-55; Judgment (Judge Mackay), TMH, 16/4/1890, MB 13 pp.319-320; A.G. Bagnall Wairarapa: An Historical Excursion Masterton: The Masterton Trust Lands Trust, 1976, p.6; Ballara, p.372; McEwen, p.76; S.P. Smith, pp.160-161

[28] Eruera Rangitakaiwaho, TMH, 27/9/1888, MB 9 p.170; also 5/10/1888, pp.255-256, 8/10/1888, p.279; Hohepa Aporo, "the land was given to Te Rerewa", TMH, 23/10/1888, MB 9 p.436, cf. "Rangitawhanga purchased it", 27/9/1888, p.175; Piripi Te Maari, "The land given for the canoes by Te Rerewa", TMH, 2/11/1888, MB 10 p.3, cf. "obtained in payment for the canoes", 6/11/1888, p.47. Note that the role of the interpreter in the Native Land Court process must always be borne in mind when attempting to draw any semantic conclusions from testimony given originally in Māori. See also Chrisp, p.62, who describes it as a 'cession'.

[29] Margaret Mutu 'Cultural Misunderstanding or Deliberate Mistranslation?' Te Reo 35 (1992): 57-103, pp.58-64

[30] ibid.; Manatū Māori Customary Māori Land and Sea Tenure Wellington: Manatū Māori, 1991, pp.20-22; Waitangi Tribunal The Pouakani Report 1993 (Wai 33) Wellington: Brooker and Friend, 1993, p.14; Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) Wellington: The Tribunal, 1988, pp.52-53; Waitangi Tribunal Report of the Waitangi Tribunal on the Waiheke Island Claim (Wai 10) Wellington: The Tribunal, 1989, p.6. See pages 15-16 *supra*.

Raymond Firth noted the rarity of such large scale land transfers, although one of the purposes he gave for such transfers was "to re-equip relatives who had suffered a calamity." He believed that the Ngāti Kahungunu migrants had constructed more canoes after their arrival to reach a "proper equivalent" for the land. The general principle of *utu* required that:

> ...for every gift another of at least equal value should be returned.... The word is often translated as meaning 'payment', but its significance is broader than that. The root idea is that of 'compensation', in the wide sense, of obtaining an equivalent.[31]

Not all of Rangitāne chose to leave, and a considerable number remained under the chieftainship of Te Whakamana.[32] This prompted the parting words of Te Rerewa to the Ngāti Kahungunu newcomers:

> Hei konei ra! Ma Koutou te hewa ki a Rangi-tane, tena ano au te hoki na; ma Rangi-tane te hewa ki a koe, haere aki nei au, oti ake. Hei konei!
> [Remain here! Should you wrong Rangi-tane (who are left here) I shall return; but if Rangi-tane wrongs you, I shall be gone and not return. Remain here!][33]

Te Rerewa was only conferring on the immigrants rights over the land that had been under his own mana and control, as he had no influence over the land under Te Whakamana's chieftainship. Further arrangements were made by the immigrants with Te Whakamana, who also "made over"[34] land to them, especially to those who intermarried with Rangitāne women. Hōhepa Aporo stated that "Pouri and Rakairangi gained a right ... through the wakaatu o te Wakamana they took possession of it and afterwards made payment to Rangitane ... they gave a garment for it."[35] Te Whakamana confirmed the arrangements made by Te Rerewa and showed the boundaries and resources of the land to the Ngāti Kahungunu, thereby clearly demonstrating what was and was not theirs to use.[36] Thus a Rangitāne presence was maintained in the area, independent of the mana of the Ngāti Kahungunu newcomers.[37]

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[31] Raymond Firth Economics of the New Zealand Maori Wellington: Government Printer, 1959, pp.388-389,412-417. See also Customary Māori Land and Sea Tenure, p.21

[32] Manihera Rangitakaiwaho, WMH, 12/11/1883, MB 4 p.126; Chrisp, pp.41-42,53; Gaela Mair, p.22

[33] S.P. Smith, p.160. Translation by Smith.

[34] Ngatuere, Patakakurawhiti Succession, 17/8/1888, MB 8 p.333

[35] TMH, 29/10/1888, MB 9 p.496. "[T]hrough the wakaatu o te Wakamana" might be translated as "through the showing of [the land to them by] Te Whakamana."

[36] Ballara, pp.87,364-365,372; McEwen, p.77; S.P. Smith, p.161

[37] The orthodox view of the settlement of the Wairarapa district, which tended to give sole tāngata whenua status to Ngāti Kahungunu, has been challenged by Steven Chrisp who has stressed the ongoing presence of and distinctions between both groups in the district, and the role of Percy Smith's article (see page 189 note 19

Ngāti Kahungunu lived peacefully under the mana of Rangitāne for a few decades until Rakaumoana of Rangitāne killed Te Aoturaki of Ngāti Kahungunu. This led to Ngāti Kahungunu attacking Rangitāne and gaining land in excess of that which they had been granted, and it also asserted their own control over the area.[38] The process of transferring mana over the lake area from Rangitāne to the Ngāti Kahungunu hapū was more or less completed in the days of Te Hiha, a great-grandson of Te Rangitāwhanga, who was a leading figure of his time. According to Ani Hiko and her hapū Ngāti Te Hiha, claimants for the Tipua Mapunatea block in the Native Land Court in 1890, Te Hiha was attacked and forced to flee by Ngāti Rongomaiaia under Rangituinomotu and Te Akitu o te Rangi, who were jealous of Te Hiha's fame.[39]

The land in the area then fell under the sway of Ngāti Rongomaiaia and their Ngāti Moe and Ngāti Kahukuraāwhitia associates, all of these hapū having strong Rangitāne and Ngāi Tara connections. Some of the Ngāti Kahungunu hapū fled with Te Hiha, but their absence from the area was short-lived. It seems that Te Rangituinomotu irked some of his allies, who then joined up with Te Hiha, having met him as he was preparing to recover the territory he had lost. After a series of fights Te Hiha regained control of the areas given to Te Rangitāwhanga by Te Rerewa as well as the territory conquered subsequent to that by Ngāti Kahungunu.[40] His act confirmed the pre-eminent status of the various hapū that traced their descent from the Ngāti Kahungunu immigrants, which led to later generations claiming primarily from these ancestors rather than their Rangitāne ones, although many hapū to the west retained their strong associations with the earlier inhabitants.[41]

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supra) in fostering this view. James Belich has also emphasized that the changing names of the Wairarapa people reflected long-term power politics in the region, and not immediate conquest. Chrisp, *passim*; James Belich Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century Auckland: Allen Lane/The Penguin Press, 1996, p.97

38 Hohepa Aporo, TMH, 29/10/1888, MB 9 p.495; Piripi Te Maari, TMH, 2/11/1888, MB 10 p.3; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 pp.319-320; McEwen, p.91

39 Claimants' Statement of Case, TMH, 16/4/1890, MB 13 pp.320-321

40 Hemi Te Miha, TMH, 2/10/1888, MB 9 pp.192-193; Kahu o te Rangi, TMH, 3/10/1888, MB 9 pp.219-220; Eruera Rangitakaiwaho, TMH, 4/10/1888, MB p.229; Hohepa Te Wakiumu, TMH, 17/10/1888, MB 9 pp.393-394; Wi Hutana, TMH, 13/11/1888, MB 10 pp.58-59, 17/11/1888, p.104; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 pp.320-322; Ballara, pp.587-603; S.P. Smith, p.162

41 Ballara, pp.114-115,159-160; Chrisp, *passim*, especially pp.42,52-53,57

Peace reigned in the Wairarapa until the beginning of the nineteenth century, when the massive upheavals which convulsed the North Island in this period made themselves felt in this isolated corner. Apart from a passing encounter with the *Endeavour* in 1770, contact with Westerners was extremely limited until 1840.[42] The absence of Western visitors did not mean that Wairarapa Māori were insulated from the immense changes wrought in Māori society by contact with Western culture. An ample demonstration of this lies in the estimated half to two-third reduction in the population of the Ngāti Kahungunu tribal *rohe* (from the Mahia Peninsula to Wairarapa) in the period 1769 to 1840.[43] The circumstances of new technology and available trade enabled warriors of great personal ability such as Te Rauparaha to subjugate vast areas, and it was the arrival of Te Rauparaha in the Port Nicholson area in the 1820s which signalled another period of great upheaval for the Wairarapa peoples. Their Ngāti Kahungunu kin in Hawke's Bay were also affected by incursions by northern raiders into their *rohe* in the 1820s.

The first incursion came in 1820 when a Ngāti Toa and Ngāpuhi party attacked Tauherenīkau and other Wairarapa pā, but they did not remain in the area. From 1821, the presence of Te Rauparaha and Ngāti Toa in the western Rangitāne districts provoked the involvement of some of the Wairarapa hapū in efforts to remove him. In 1824 and 1825 Ngāti Tama and Te Āti Awa from Taranaki began to move into the district, and settled peacefully at first at the mouth of Lake Ōnoke. This cordiality did not last at all long, as by 1826 there were suspicions that the Taranaki settlers intended to conquer the area, which led to limited skirmishing followed by periods of uneasy peace. Some Wairarapa families began then to drift north to their kin in Hawke's Bay. Eventually, the leading Wairarapa chiefs, including Tūtepākihirangi and Te Hiko Tamaihikoia, led an attack which devastated Ngāti Tama. Such an attack could not go unavenged, and the Wairarapa people were so badly ravaged by the Taranaki *taua* that in about 1831 or 1832 the survivors fled to Nukutaurua, whence they had come centuries before.[44]

In the later Land Court proceedings, the Wairarapa hapū maintained that while the bulk of the people went to Nukutaurua, small pockets of people from some hapū remained on the land

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[42] A.D.W. Best The Journal of Ensign Best Wellington: Government Printer, 1966, p.270

[43] Ballara, p.334

[44] Ngatuere, Maramamau, 12/8/1867, MB 1 p.144; Wi Hutana, TMH, 24/11/1888, MB 10 p.175; Hemi Epanaia, TMH, 5/12/1888, MB 10 p.276; 'Report by Mr. Searancke on the Native Lands in the Wairarapa' AJHR 1860 C-3, p.3; Ballara, pp.446,458-459; McEwen, pp.127-131; Gaela Mair, p.13

and 'kept the fires burning' to preserve their *ahi kā*.[45] Their presence did not deter certain Ngāti Toa, Ngāti Raukawa and Te Āti Awa from moving into the district; but their numbers were never great.[46] The attempts of the Wairarapa hapū to re-establish themselves began in 1835 under the leadership of Nuku-pewapewa, who brought a small group back to the Wairarapa. Notwithstanding their lack of numbers, Nuku's party managed to capture most of the leading chiefs of the invaders, but they had to make peace and return to Nukutaurua as they had not the wherewithal to capitalize on their victory. They took with them as hostages the step-daughter and niece of Te Wharepōuri, a Te Āti Awa chief. After this, Te Wharepōuri encouraged the Te Āti Awa and Ngāti Tama invaders to leave, and went to Nukutaurua himself in about 1840 to invite the Wairarapa peoples to return in exchange for the return of the hostages, which they did over the summer of 1841-1842. A few of the Ngāti Tama under Taringa-kuri remained near what is now Featherston, but the lake area came back under the control of the Wairarapa hapū.[47]

The effects of these disturbances were wide-reaching. Firstly, there was a dramatic effect on the population of the district. Approximate figures from archaeological research and early censuses show a total population of about 900 in 1820, which sank to about 600 at the time of the *heke* to Nukutaurua in the mid 1830s, then dropped away to under 600 by 1850, rising again to 850 in 1870 before falling to 742 in 1874. There was a rapid decline in the Māori population throughout the latter half of the nineteenth century, due to recurrent epidemics of diseases introduced into New Zealand by the Western newcomers, falls in fertility resulting from poor nutrition and disease, and the process of land alienation.[48] Secondly, it broke a centuries-long period of continuous occupation of the Wairarapa by the Ngāti Kahungunu-Rangitāne

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[45] Ngatuere, Maramamau, 12/8/1867, MB 1 p.144; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 p.249; Hohepa Te Wakiumu, TMH, 16/10/1888, p.378; Ballara, pp.325,462; A.D.W. Best, p.265n; Gaela Mair, p.13

[46] Ballara, pp.325,459; Downes 'History of Ngati-Kahu-Ngunu', vol. 24 p.80

[47] Te Tutere Whakehaurangi, Maramamau, 13/8/1867, MB 1 p.145; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 p.251; 'Report by Mr. Searancke', p.3; Ballara, pp.459-460; Downes 'History of Ngati-Kahu-Ngunu', vol. 24 pp.80-87; 'Nuku-pewapewa' The People of Many Peaks: The Maori Biographies from The Dictionary of New Zealand Biography, Volume 1, 1769-1869 [PMP] Wellington: Bridget Williams Books & Department of Internal Affairs, 1991, p.80

[48] 'Return Giving the Names of the Tribes of the North Island, etc.' AJHR 1870 A-11, p.10; 'Approximate Census of the Maori Population' AJHR 1874 G-7, pp.14-15; Gaela Mair, p.15; Ian Pool Te Iwi Maori: A New Zealand Population Past, Present & Projected Auckland: Auckland University Press, 1991, pp.44-50,62-63,75-91,100-103

group, notwithstanding the small groups that remained while the others were at Nukutaurua. This was to have consequences when lands came before the Native Land Court. Thirdly, they were absent from their *tūrangawaewae* at a key time, when British sovereignty was being established over the country and settlers were arriving and seeking land. Te Āti Awa willingly gave squatting rights in the Wairarapa Valley to Pākehā.[49] Thereby British settlers gained a foothold in the district, and many of those who returned from Nukutaurua, especially the younger people, adopted a modified and modernized lifestyle. Throughout the 1840s, 1850s and 1860s large areas of the district were leased by Māori to Pākehā runholders. Government pressure on Māori to sell rather than lease increased in the 1850s and 1860s, and vast tracts of the Wairarapa, including parts of the lake shore, were sold to the Crown.[50]

Pākehā appropriation of control of the Wairarapa fisheries

Because of its proximity to Wellington and vast expanses of land suitable for grazing stock, Pākehā began to seek land in the area from the early 1840s. Thus the lakes themselves were subject to Pākehā interest from an early stage. The first Pākehā attempts to acquire large areas of land for settlement in the Wairarapa came from the New Zealand Company in 1842-1844, and some land up the Ruamāhanga was sold.[51] Many chiefs, especially Mānihera Rangi-takaiwaho, continued to lease land in the vicinity of the lakes to European runholders throughout the 1840s at profitable rates for the lessors, a practice which was regarded by officials as inimical to colonization. The government began its efforts to buy land in the area in 1848, when searching for a site for the Canterbury settlement, but the Wairarapa chiefs resisted these overtures, leasing still being a far more profitable arrangement. The older chiefs were coming under pressure to sell

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[49] A.D.W. Best, pp.269-270; Gaela Mair, p.15

[50] Hohepa Te Wakiumu, TMH, 16/10/1888, MB 9 p.378; Hohepa Aporo, TMH, 23/10/1888, MB 9 p.447; Wi Hutana, TMH, 24/11/1888, MB 10 p.175; Eruera Turei [Rangitakaiwaho], TMH, 3/3/1890, MB 13 p.120; Bagnall, p.377; Gaela Mair, p.17; 'Te Hiko Piata Tama-i-hikoia', PMP, p.171; 'Te Manihera Te Rangi-taka-i-waho', ibid. pp.259-260

[51] 'Te Manihera', PMP p.259

from the young men, especially Mānihera, who forged the signatures of a number of the older chiefs on the Tauherenīkau deed of 1848, much to the disgust of his family.[52]

Large scale alienation of land to the Crown began in 1853. In this year Chief Land Purchase Commissioner Donald McLean negotiated the purchase of a million acres of Ngāti Kahungunu territory, including a number of blocks along the shores of the lakes, in a manner that was, according to Alan Ward, "none too careful or scrupulous."[53] The boundary of the block to the east of the lake as given in the deed of sale ran along the Ruamāhanga River into the lake, "and the Wairarapa Lake forms the boundary till it empties itself into the sea"; it was 120 000 acres in extent and £1100 was paid.[54] It was a matter of dispute whether this boundary line extended into the middle of the lake, or merely as far as the high water shoreline, but at the time of the sale McLean gave verbal assurances that the lakes and swampy areas below high water were to stay in Māori hands, and that the lake mouth was not to be interfered with.[55] The exact terms of the sale became an issue in 1855 when parts of the lake bed were uplifted by the earthquake, and government lawyers had to deal with the unfamiliar problem of land appearing as if from nowhere. If the lakes had remained in Māori ownership following the 1853 sale, this land would properly be Māori land. The sale to the government in 1862 of the Te Puata (or Te Taheke) Block, on the eastern fringe of the Lake and comprising in part land below the 1853 high water mark, would suggest that the agreement was honoured until at least that time. McLean also deliberately fudged the issue of the boundaries of the various reserves within the 1853 sale areas, apparently hoping to negotiate lower prices by doing so.[56]

The timing of the 1855 earthquake limited its effect on customary fisheries. By this time Pākehā settlers had arrived in the Wairarapa in numbers, and the *heke* to Nukutaurua[57] had

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[52] Wairarapa Commission Report, p.1; Bagnall, pp.85-89,91,94-95,101,135-136; H.A. Heron Early Wairarapa Masterton: Palamontain & Petherick, 1929, pp.30-32,38; 'Ngatuere Tawhirimatea Tawhio', PMP p.75; 'Te Hiko Piata Tama-i-hikoia', ibid. p.171; 'Te Manihera', ibid. p.259

[53] Alan Ward A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand Auckland: Auckland University Press, 1973, p.88

[54] Copy of Deed dated 6/9/1853, MA 13/97, N.A.; see also Bagnall, pp.97-107,122-123. The 200 000 block on the western shore of the lake was purchased for £2000, and other purchases to the east were tens of thousands of acres in extent. The deed for the sale of the eastern shore was then mislaid until the time of the 1891 Commission.

[55] Wairarapa Commission Report, pp.2-3,7,9; 'Piripi Te Maari-o-te-rangi', PMP p.203

[56] Bagnall, pp.105,129-130; Wairarapa Commission Report, pp.4,9; 'Te Manihera', PMP p.260

[57] See pages 194-195 *supra*.

already enormously disrupted traditional social structures. The earthquake itself brought more changes. It increased the area of potential grazing land around the lake, and this in conjunction with the effect that the flood cycle had on existing stock runs led to increasingly vociferous efforts by Pākehā settlers to have the lake mouth opened permanently. Most importantly, the earthquake altered many customary fishing areas beyond recognition, and made them irrelevant in terms of Native Land Court proceedings. Even though the Court was concerned with the possession of the land as of 1840,[58] whole lagoons and streams had become dry land since then. The Land Court did not hear most key cases in the Wairarapa until the 1880s, so many of those who had extensive first-hand knowledge of pre-1855 fishing practices had passed away. Therefore, long-standing practices in the areas most affected by the earthquake may have been marginalized in Land Court proceedings.

The increasing number of Pākehā pastoralists farming the flood zone began to put pressure on the government to do something about the annual inundation of their lands. Due to the uncertainty of the ownership of lake fringe land, some of the land below the 1853 high water line had been sold to settlers by the government, and other areas had been sold by Māori themselves.[59] However, were the government to have any right to conduct permanent drainage works at the lakes, it would need to obtain the consent of the Māori owners. As the sole economic value of the lakes to the Māori lay in their fishing resources, it was believed that the purchase of these fishing rights by the government would remove Māori grounds for complaint if the lake mouth were to be opened permanently.[60] The elderly chief Te Hiko was persuaded by others, including Mānihera and Hēmi Te Miha, to sell his fishing rights in the lake to the Crown for £800 (along with 16 others whose signatures appear on the deed), but his right to alienate rights over the whole of the lake was challenged both by other Wairarapa chiefs (under the leadership of Piripi Te Maari) and Pākehā officials familiar with Māori land tenure.[61]

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[58] This was a precedent established by early Land Court judges. See page 201 note 70 *infra*.

[59] Wairarapa Commission Report, pp.4,6; 'Piripi Te Maari', PMP p.204

[60] E.S. Maunsell to Native Department, 9/3/1875, NO 75/974, MA 13/97, N.A.; Wairarapa Commission Report, pp.4,7-8; 'Te Hiko', PMP p.172

[61] Raniera Te Iho to Mr. Halse, Native Department, 24/6/1876, MA 13/97, N.A.; E.S. Maunsell to Native Minister, 7/9/1879, NO 79/3608, ibid.; Piripi Te Maari to Native Minister, 13/5/1887, ibid.; Wairarapa Commission Report, pp.4-5,8,10,11; Bagnall, pp.378-379; 'Te Hiko', PMP p.172; 'Piripi Te Maari', ibid. p.204; 'Te Manihera', ibid. p.260

As the Crown had not bought out the interests of all the owners, and because of the protests of the remaining Māori owners, the parliamentary Native Affairs Committee reported in 1876 that "the majority of the owners of the lake have not joined in the sale and they [the Committee] are of the opinion that it would have been better that the title should have been investigated by the Native Land Court."[62] The Native Land Court had sat sporadically at Featherston, Greytown and Masterton since 1866, and had investigated the title to a few blocks on the lake shore. These included Maramamau on the north-east of the upper lake, which had already been ceded to the Crown; Tūranganui and Okoura, to the east of Lake Ōnoke, which had been reserved from the 1853 sale; and Otaupuaroaro, near where the Ruamāhanga River flows into the upper lake. Fishing was mentioned in some of these cases, but fishing rights were not of prime importance in any of the cases and did not feature in the judgments of Judges T.H. Smith, H.A.H. Monro and J. Rogan.[63]

The Crown appeared before Judge Brookfield in the Native Land Court in June 1881 seeking the grant of all the fishing interests in the lower lake. The Court adjourned the case pending further clarification of the legal issues, as in the opinion of the Assistant Law Officer, "a right to fish was not an interest in land and therefore not within the jurisdiction of the Court."[64] The Crown attempted in 1882 to purchase the shares of the remaining owners, with little success, although it was granted 11 of the 28 shares in Wairarapa Moana North by the Native Land Court in that year, on the basis of having already purchased the fishing rights of some people in 1876.[65] The Wairarapa Moana case finally came before Judge Puckey in the Native Land Court in 1883,

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[62] 'Reports of the Native Affairs Committee' AJHR 1876 I-4, p.17; see also 'Reports of Native Affairs Committee' AJHR 1877 I-3, p.38

[63] Maramamau, 23/7/1866 & 16/8/1867, MB 1 pp.121-153; Turanganui, 7/10/1868, MB 1A pp.35-36; Okoura, 24/3/1869, MB 1H pp.77-78; Hurunuiorangi, 29/3/1869, MB 1H pp.103-113; Otaupuaroaro, 24/10/187, MB 3 pp.28-29

[64] Assistant Law Officer, Wellington to Native Land Purchase Office, 22/6/1881, NLP 81/244, MA 13/97, N.A.; Wairarapa Moana South, 15/6/1881, MB 3 pp.348-352. Following Chief Judge Fenton's politically unpopular Kauwaeranga judgment of 3 December 1870, which had implicitly rejected the Crown's contention (based on English common law) that Māori could not own foreshore land under customary title, the government removed tidal land below high water mark from the jurisdiction of the Native Land Court in 1872. This had increased the reluctance of Native Land Court judges to deal with fishing rights. See A. Frame 'Kauwaeranga Judgment' Victoria University of Wellington Law Review 14 (1984): 227-245, pp.227-228; New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi Wellington: Law Commission, 1989, pp.115-117,167-169; Waitangi Tribunal Ngai Tahu Sea Fisheries Report 1992 (Wai 27) Wellington: Brooker and Friend, 1992, pp.155-157. See also pages 84-85 *supra*.

[65] Wairarapa Moana North, 18-26/10/1882, MB 4 pp.33-47

with 139 Māori being granted shares as owners of the lake, confirming the role of the Crown (which was granted 17 shares because of the earlier purchases) as merely co-owners or tenants-in-common. This did not give the Crown the right to open the lake mouth as it had wished.[66]

While fishing rights were at the centre of the three Wairarapa Moana cases, and Māori witnesses spoke at length about their rights in those cases, the judgments of the Court demonstrated little interest in the actual nature of customary Māori fishing rights in the lakes. Presumably this was because the Court was in practice weighing up the relative interests of those who had sold their fishing interests to the Crown and those who did not wish to, although this would require a consideration of the basis on which fishing rights were allocated. The cases were brought because of the government's desire to acquire the Wairarapa fishing rights, as these were seen as the main obstacle to the opening of the lake mouth and draining of farm land; this took preference over investigation of ownership of the traditional fishery.

As the Court process had not enabled the Crown to acquire all of the fishing rights, alternative strategies were then employed to keep the lake mouth open. Local Māori had agreed to let the lake mouth be opened earlier than its natural opening, but this was not regarded as a sufficient concession to the desire of the settlers for more dry pasture land.[67] The South Wairarapa River District was proclaimed in September 1886, and used the provisions of the River Board Act, 1884, to open the lake mouth when flood waters threatened farm land. There were some lingering doubts about the legality of this action, as only the County Council had the right to undertake work of that type, but the Public Works Act 1889, allowed the Board to maintain an outlet to the sea. Naturally, this created great discontent amongst the Māori owners of the lake, many of whom were still upset by the circumstances of the 1876 fishing rights sale. The result was a petition to Parliament in 1890.[68]

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[66] Judgment (Judge Puckey), WMH, 13/11/1883, pp.141-142; Opinion of the Solicitor General on Wairarapa Lakes, 31/5/1888, MA 13/97, N.A.; Minute from Native Minister "Asking for an opinion from the Solicitor General re Wairarapa Lakes", 31/5/1888, NLP 88/130, ibid.; Wairarapa Commission Report, pp.6,8; Bagnall, p.379

[67] Piripi Te Maari to Mr. Gill, 24/1/1884, NLP 84/30, MA 13/97, N.A.; Piripi Te Maari and others to Native Minister, 29/10/1886, NLP 86/467, ibid.; Committee of Owners of Wairarapa Lake to Native Minister, 12/11/1886, ibid.; Clerk of South Wairarapa River Board to Native Minister, 22/1/1887, ibid.; Wairarapa Commission Report, pp.5-8

[68] Piripi Te Maari to Native Minister, 13/5/1887, MA 13/97, N.A.; Wairarapa Commission Report, pp.5,9,12; Bagnall, pp.380-381; 'Piripi Te Maari', PMP p.205; Pouakani Report, p.299

The outcome of the petition, and of ongoing trouble between Māori and the Pākehā settlers in the Wairarapa, was the Commission of Enquiry into the Claims of Natives to Wairarapa Lakes and Adjacent Lands in 1891. This was conducted by Alexander Mackay, the Native Land Court judge who had heard the bulk of the wide-ranging Tipua Mapunatea case in 1888 and 1890. Mackay had lived in New Zealand since boyhood, was a student of Māori language and culture, and had been native reserves commissioner before becoming a Land Court judge. In 1886 he had conducted a commission into Ngāi Tahu land claims in the South Island and proposed substantial compensation.[69] His Commission was able to range more widely than the Native Land Court had been, as the Court had been limited to investigating title as of 1840,[70] and its focus on the ownership of land rather than fisheries led the Court to take only a limited interest in fishing rights. Mackay returned a report which agreed with many of the petitioners' complaints, and emphasized the importance of the Wairarapa Moana fishery, but ultimately recommended that settlers' land should not be flooded.[71]

While Mackay gave emphasis to the importance of the fisheries in Wairarapa Moana, comparing them with the Newfoundland cod fishery and equating Māori fisheries with European agriculture, his report reflects contemporary Pākehā political concerns. He made clear his disapproval of those Wairarapa Māori who had resisted Crown efforts to purchase their lands and rights, and he also regarded the leasing of land to settlers by Wairarapa chiefs in the 1840s as injurious to colonization because of its "interfering with the acquirement of land by the Government".[72] Mackay had the opportunity to consider freshwater fishing rights in detail, and this Commission Report is indicative of his findings on fisheries in general.

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69 'Alexander Mackay' The Dictionary of New Zealand Biography: Volume Two 1870-1900 Wellington: Bridget Williams Books & Department of Internal Affairs, 1993, p.289. See page 206 note 87 *infra*.

70 While not explicitly required in the empowering legislation (the Native Lands Acts of 1862 and 1865), it was quickly established in early Land Court judgments that the Court should imagine itself to be sitting in 1840, as the effects of the Treaty of Waitangi and annexation were held to have stabilized customary title at that point in time. It was also feared that were the Court to allow post-1840 conquests as *take raupatu*, it would encourage inter-tribal conflict and infringe upon the rule of Pakeha law. (See Norman Smith Maori Land Law Wellington: A.H. & A.W. Reed, 1960, pp.88-89). The 1840 rule was not always rigidly enforced in areas such as the Wairarapa, where the usual occupants of the land were temporarily absent in 1840, and the invaders did not retain a presence after the return of the tāngata whenua. See pages 194-195 *supra*.

71 Wairarapa Commission Report, pp.1-12

72 ibid. p.1

Mackay discussed Māori fishing rights only in relation to the provisions of the Treaty of Waitangi, and to government policies, rather than in their own context. He recognized economic aspects of eel fishing, such as the exchange of surplus eels for goods from other districts. He also looked at control over the lake fisheries, but his concern was with those aspects of control and chiefly rights which related to the sale of the fishing rights to the Crown. He rejected the assertion that the leading chief Te Hiko had a "paramount control" over the lake. His understanding of Te Hiko's rights was that Te Hiko had "a superior control", and was the only person who could declare the lake mouth fishery open, but he did not believe that Te Hiko could act in a manner detrimental to the fishing rights of others. Mackay believed that fisheries were the common property of the "hapu or tribe", held conjointly by the chiefs and people, and that chiefs could not alienate fisheries without general consent.[73]

Confrontation between Māori and settlers persisted after the Commission Report, as did the attempts of Piripi Te Maari to get compensation for the losses suffered by the lake owners. After even more petitioning of Parliament and court action, negotiations were entered into and the Crown finally completed the purchase of the lake in 1896. In compensation for the loss of their fishing rights, the Crown was to use the sale moneys to buy land for the affected hapū which could be reserved to them for their settlement. The Crown decided that land in the Wairarapa region would cost more than the £5000 (originally £2000) it had hoped to spend. Alternative sites were sought, and in 1915 title was granted to 230 'Wairarapa Natives' to just over 30 000 acres of undeveloped scrubland about 300 km away on the Waikato River at Pouakani, where Mangakino now stands.[74]

The Pākehā view of fishing rights in Wairarapa Moana was focussed firmly on those aspects of fishing rights which directly affected the extension of Crown control over the lakes and their fisheries. The impression given by the judgments of the Native Land Court, Mackay's Commission Report, and the opinions of various government officials, is that the actual details of fishing practices and the exercise of fishing rights were not important. However, when one

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[73] ibid. pp.5-6,10

[74] 'Piripi Te Maari', PMP p.205; Bagnall, pp.382-384; Mataitai, pp.167-168. Many people of Ngāti Kahungunu did migrate to Pouakani, and in the 1960s some of this land was taken for hydroelectricity works. Their presence has complicated the already complex difficulties in the relationship between the original Pouakani people and the Crown — Pouakani Report, pp.301-302.

examines the evidence from which these Pākehā officials drew their conclusions about fishing rights, it is immediately apparent that Māori had a clear and detailed view of what fishing rights entailed, and were prepared to debate the details of particular fishing rights. This is not reflected in the final judgments in this area. The history of Pākehā involvement in the Wairarapa fisheries has been discussed in such detail because Māori who spoke to the Native Land Court and Mackay's Commission were working within this framework as well as to a customary Māori agenda. It is on this evidence given by Māori that the following analysis of key aspects of traditional fishing rights is based.

Ancestral fishing rights at the lake mouth

The evidence for the exercise of fishing rights in Lake Ōnoke is drawn largely from Mackay's Commission of 1891. This Commission focussed on fishing practices and took evidence on these specifically as part of its investigation, unlike the Native Land Court, which focussed firmly on land and alienation issues. It also took comprehensive evidence on the disposition of the different sections of the lake, listing both the hapū and the chiefs involved in each particular area. Te Whatahoro Jury told the Enquiry that "I can describe the hapus who owned the land and fishing rights in the lake" and went on to give an extensive list of names (of both people and hapū) and places.[75] However, while the Commission of Enquiry was concerned largely with contemporary fishing rights in the lake, going back no further in their investigations than the early nineteenth century, the Native Land Court heard evidence concerning the whole history of the lake area, going back to the time of Te Rerewa and Te Rangitāwhanga.

The gift exchange of the Wairarapa Lakes and surrounding areas made by Te Rerewa to Te Rangitāwhanga formed the basis of all later claims of fishing rights at the mouth of Lake Ōnoke. Virtually all who gave evidence in the various Land Court hearings concerning the lake agreed that the lower lake formed part of the area apportioned to Te Rangitāwhanga when the lands were divided amongst the Ngāti Kahungunu migrants,[76] although others in that migrant

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[75] Wairarapa Commission Report, p.29

[76] See pages 191-192 *supra*; Paraone Pahoro, WMH, 8/11/1883, MB 4 p.117; Piripi Te Maari, WMH, 10/11/1883, MB 4 pp.123,126; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.24, 6/11/1888, p.47; Enoka Taitea, TMH, 10/10/1888, MB 9 p.319; Hohepa Te Wakiumu, TMH, 17/10/1888, MB 9 pp.393-394; Hohepa Aporo,

group were also set up as ancestors from whom *take tupuna* over the lake mouth was derived. These other designated ancestors included Pōuri, Tukoko, and Kariwhare, who were generally held to have a right to the lake mouth alongside Te Rangitāwhanga, rather than separately from him.[77] Such claims were usually put forward by those who had a closer genealogical connection to those other ancestors than they did to Te Rangitāwhanga. For example, Piripi Te Maari (who had connections with Ngāti Rakairangi as well as Rākaiwhakairi, and who was a rival of the leading Rākaiwhakairi chief Te Hiko) stressed Tukoko as the key ancestor from whom the lake mouth was derived, although he also gave Te Rangitāwhanga as an ancestor from whom he derived an interest there. He told the Court that "[f]rom Tukoko down to the present time we have always resided on this land.... I can point out all the places where Tukoko down to myself have lived on this land", and made a near identical statement regarding the ancestor Rakairangi.[78] The continuity of rights at the lake mouth from the times of the early ancestors was stressed by a number of people, which attests to the importance of *ahi kā* or continuity of occupation to reinforce *take tupuna*. Irahāpeti Whakamairu, a descendant of Te Rangitāwhanga, told the Court that "[m]y Ancestors have resided permanently at these lakes, myself as well."[79]

While in subsequent years the fisheries of the lake as a whole were divided amongst the various hapū descended from the migrants, on the basis of the occupation of its shores, a right to fish at the lake mouth appears to have descended to a larger number of hapū. Some of these resided some distance away, but many aspects of control were retained by a smaller group comprised of descendants of Te Rangitāwhanga. When the Wairarapa Moana North case came before the Land Court in 1882, Mānihera Rangitakaiwaho, a leading man of Ngāti Kahukura-āwhitia and Ngāi Tukoko, stated that about 30 chiefs and some 500 other individuals had an interest in the lower lake.[80] Rāniera Te Iho objected to the sale of fishing rights in the lake on the grounds that the weirs belonged to "a good many persons" and not just the few individuals who

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TMH, 23/10/1888, MB 9 p.442; Wi Hutana, TMH, 13/11/1888, MB 10 pp.54-55, 23/11/1888, p.158; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 pp.319-320

[77] Paraone Pahoro, WMH, 8/11/1883, MB 4 p.117; Manihera Rangitakaiwaho, WMH, 10/11/1883, MB 4 p.123; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 pp.255-256; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.24; Wi Hutana, TMH, 13/11/1888, MB 10 pp.54-55

[78] WMH, 10/11/1883, MB 4 pp.123,126

[79] WMH, 13/11/1883, MB 4 pp.130-131

[80] Wairarapa Moana North, 26/10/1888, MB 4 p.45

had sold on behalf of all.[81] Hapū who put forward a claim to the lower lake included Ngāti Moe, Ngāti Rakairangi, Ngāi Tukoko, Ngāti Hinetaùira, Ngāti Hineraumoa, Rākaiwhakairi, Ngāti Kahukuraāwhitia, Ngāti Te Hiha, Ngāti Haua, Ngāti Te Kauhou, Ngāti Kohinewai, Ngāi Tahu, Ngāti Hemingi, Ngāti Muretū, Ngāi Te Hangarakau, Ngāi Taneroa, and Hāmua, and the interest of others was also referred to.[82]

The large number of hapū groupings involved demonstrates both the extensive associations between the inhabitants of the whole Wairarapa district and the lake mouth fishery, and the complex nature of hapū affiliation in the area. Not only might any given individual have affiliations to several of the hapū named (many of the chiefs who appeared in the Land Court were representative of two or three hapū), but as in most parts of the country, hapū in the Wairarapa were often little more than an extended family group of three or four generations who chose to identify themselves as hapū but who also considered themselves a branch of one or more larger hapū.

Direct and indirect rights at the lake mouth

Those who did fish at the lake mouth did so through either what might be called a direct, ancestral right (*take tupuna*) or an indirect right (that is, one derived from other than ancestry and continued occupation). This distinction was made by Hoani Paraone Tunuiarangi in his evidence to the 1891 Commission. With regard to the lake mouth fishery, he stated that "[s]ome hapus had a direct right and some had only a right through others."[83] The preference of the Native Land Court for cases based upon *take tupuna* and *ahi kā* (by Tunuiarangi's definition direct rights) meant also that evidence was presented to the Court with this distinction in mind.

The sum of evidence suggests that the right to fish any particular stretch of water, especially large bodies of water such as lakes, belonged in the first instance to those who occupied its shores.[84] At the Wairarapa Moana hearing Piripi Te Maari claimed the lake mouth

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81 Raniera Te Iho to Mr.Halse, Native Department, 24/6/1876, MA 13/97, N.A.

82 Paraone Pahoro, WMH, 8/11/1883, MB 4 p.117; Piripi Te Maari, WMH, 10/11/1883, MB 4 p.123; Hohepa Te Wakiumu, TMH, 15/10/1888, MB 9 pp.363-364,371; Wi Hutana, TMH,14/11/1888, MB 10 pp.67-68, 24/11/1888, p.179; Wairarapa Commission Report, p.19

83 Wairarapa Commission Report, p.29

84 ibid.; Gaela Mair p.21. See also pages 309-310 *infra*.

area through the ancestors Tukoko, Rangitāwhanga (both of Rangitāne and Ngāti Kahungunu) and Rakairangi, and contended that the descendants of Tukoko had maintained occupation since that time. His position on the use of the lake mouth was that "[a]ny other tribes who have resided here, have done so with the sanction only of the rightful owners. The descendants of the ancestors already named have always held possession."[85] At the Tipua Mapunatea hearing, Hōhepa Te Wakiumu stated that Ngāi Tukoko, Ngāti Hinetauira, Ngāti Hineraumoa, Rākaiwhakairi and Ngāti Rakairangi were "the principal hapus owning land near the mouth of the Lake". All these groups were closely related to each other and to the ancestors mentioned by Piripi Te Maari.[86]

The claim of the Ngāi Tahu hapū to eeling rights at the lake mouth, as put to the 1891 Commission by Tunuiarangi,[87] was based on intermarriage with a hapū that held eeling rights at the lake mouth, rather than being based on descent or *ahi kā roa* (long-term occupation). Maraea Toatoa, daughter of the Rākaiwhakairi chief Te Kai o Te Kōkopu, married Iraia, son of the Ngāi Tahu chief Te Hamaiwaho, who came from the Upper Wairarapa Valley. The lake mouth was included in the area under the control of Te Kai o Te Kōkopu (who died *circa* 1820), and according to Tunuiarangi, the area from Tauanui to the lake mouth was a "gift" from him to Te Hamaiwaho when the marriage took place.[88] Thus, in the fishing season, a temporary fishing-village was established on this land at the lake mouth by the Ngāi Tahu hapū and their relatives from the upper part of the valley, under Te Hamaiwaho. This right was preserved for as long as traditional fishing practices continued at the lake mouth, and even after the return from Nukutaurua a number of Ngāi Tahu continued to reside at Tauanui.[89] The only challenge made to Te Kai o Te Kōkopu's gift came a great many years later when Wī Hutana disputed that Te Kai o Te Kōkopu had given Ngāi Tahu the land at Tauanui, suggesting that only a *pā tuna* or eel weir had been given.[90] Wī Hutana was husband to and representative of Ani Hiko, the daughter of Te Hiko (another powerful chief of Rākaiwhakairi and their associated hapū, with considerable

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[85] WMH, 10/11/1883, MB 4 pp.122-123

[86] TMH, 15/10/1888, MB 9 pp.363-364

[87] Wairarapa Commission Report, p.29. This Ngāi Tahu is a hapū of Ngāti Kahungunu, and is not to be confused with the iwi or tribe of that name in the South Island.

[88] ibid. p.28

[89] Hohepa Te Wakiumu, TMH, 16/10/1888, MB 9 p.378; Wairarapa Commission Report, p.28; Ballara, p.231; Gaela Mair, p.24

[90] TMH, 24/11/1888, MB 10 p.179

interests in the lake mouth area), so it would seem more likely in the Land Court context that Wī Hutana was trying to play down the legitimate interest of Ngāi Tahu so that his own party would be seen as having an undiminished interest in the area.

Others claimed a right to fish at the lake mouth even though they had no residential rights there. Evidence given to the 1891 Commission suggests that some hapū fished at the lake through a *take whanaunga*[91] obtained as a result of the close inter-relations existing between the Wairarapa hapū. The existence of *take whanaunga* fishing rights went back at least to the time of the Ngāti Kahungunu migrants, when certain of Te Rangitāwhanga's relatives lived with him on the block he had been granted by Te Rerewa.[92] During the Tipua Mapunatea hearing, it was mentioned that some of the Ngāti Kahukuraāwhitia used to go eeling at Kiriwai (at the lake mouth), and that of these people, Rihari and Te Tutere stayed with their relative Hone Te Wakahaurangi while they were fishing there. This implies that either their fishing right at the lake mouth was derived from their relationship with Hone, or that they were exercising a non-residential or non-territorial right.[93]

Non-territorial rights based originally on ancestry allowed a particular descent group to continue fishing an area even after they had moved away from it, so long as they continued to exercise the right on a regular basis. The Lake Ōnoke resource was rich enough to allow all a share in the fishery, and those with an ancestral and occupational right did not attempt to prevent the exercise of non-territorial rights. Such seasonal migrations could be maintained over several generations. For example, Hanita Araina based a claim to a share in Wairarapa Moana on descent from Te Rakaumoana and his descendants, who identified most closely with Rangitāne. Te Rakaumoana's descendants had continued to live around the lakes, and had also exercised a fishing right at the lake mouth fishery down to the days of Hanita.[94]

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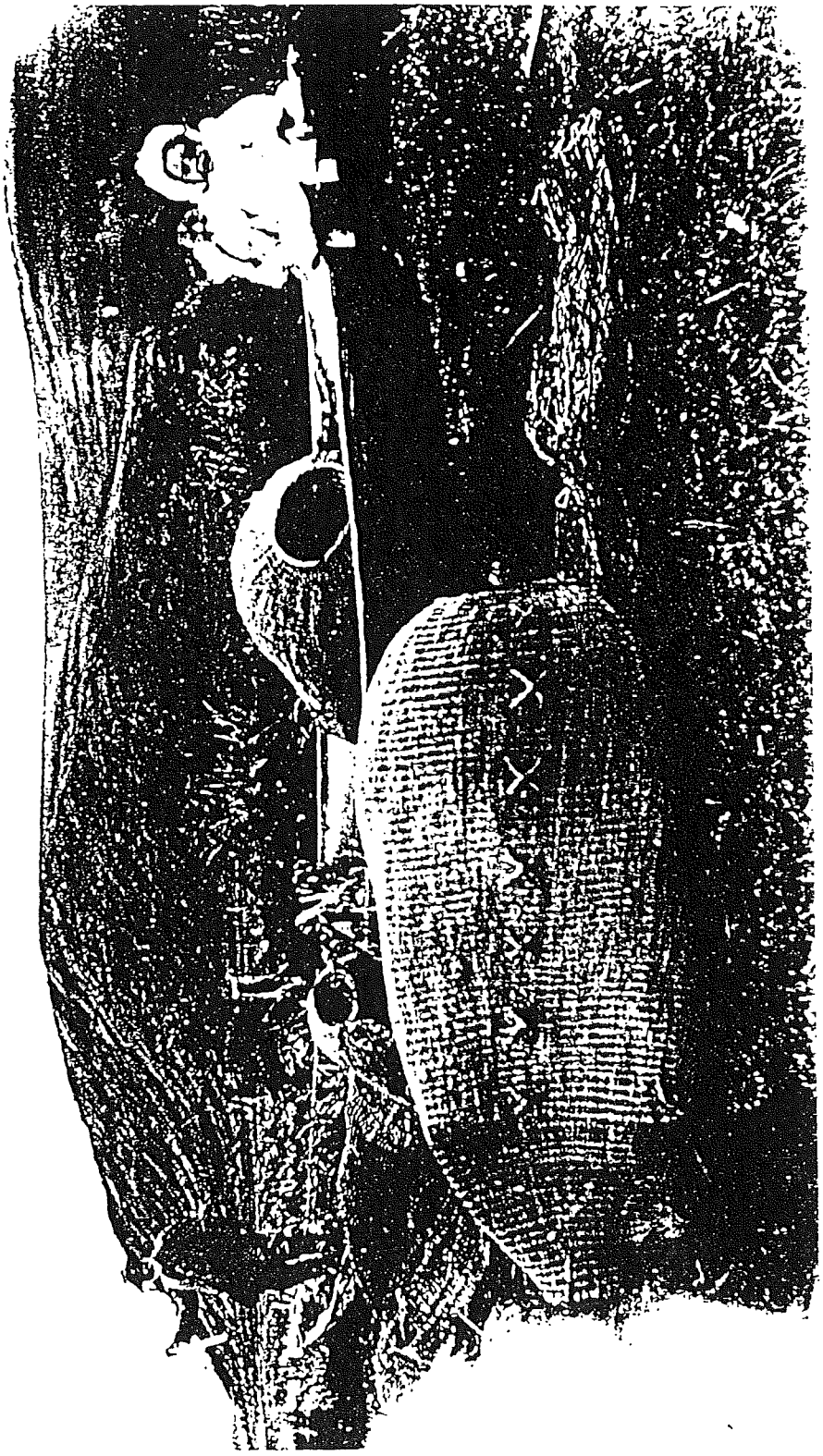
[91] The term *take whanaunga* was used on a few occasions by those appearing before the Court to describe the kinds of rights derived through personal relationships with the holders of direct rights, e.g. a fishing right being exercised by the in-laws of its 'rightful owner', or the use of a resource by maternal cousins where the right to the resource was derived from the father's family. See Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.223, cf. 'e noho whanaunga ana', ibid. 27/9/1888, p.171; Claimants' Summary of Case, Otaupuaroaro Judgment, 9/4/1890, MB 13 p.290

[92] Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 p.256; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.523; Hohepa Aporo, Matiti, 20/12/1888, MB 11 p.16; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 p.319

[93] Hohepa Te Wakiumu, TMH, 15/10/1888, MB 9 p.371

[94] WMH, 13/11/1883, MB 4 p.130; see also pages 192-193 *supra*, and Chrisp *passim*.

Fig. 4 ***Hīnaki* (eel traps) and canoe, Wairarapa Moana**
These large double-ended *waharua* could be set in lake waters to catch eels as they swam about, rather than to take migrating eels.
Photograph: J.R. Stanton, courtesy of National Museum of New Zealand Te Papa Tongarewa, Wellington, New Zealand, ref. B 13380



It seems that almost anyone who wished to fish at the lake mouth was welcome to do so, so long as they could establish some sort of connection and complied with local practices, probably because of the sheer volume of eels available. Referring to the lake mouth area, Hōhepa Te Wakiumu told the Court: "All the descendants of an Ancestor would be entitled to his lands no matter where situated."[95] There was no objection to Pākehā settlers sharing the lake mouth fishery. Regardless of how the right was obtained, many people attested that all groups fished together at the mouth, with no particular fishing places reserved to any particular individuals, unlike the creeks and rivers where each area was apportioned to a particular hapū.[96]

Management and control of the lake mouth fishery

With the lake mouth fishery being shared by so many different groups, with different types of rights, the question of control was a crucial one. Those who had a less direct right to use the lake mouth for fishing had correspondingly less control over the resource. The various Native Land Court and Commission of Enquiry witnesses often disagreed on where control was vested and how far it could be exercised, depending on their own hapū and family associations. Their interpretations covered a whole range of options, from one particular chief controlling the whole area, through control being vested in a number of chiefs under the superior mana of one *primus inter pares*, to the control of the lower lake being vested roughly equally in a number of chiefs.

Some people claimed that the descendants of Te Rangitāwhanga and Te Hiha exercised a superior authority or had mana over the lake mouth fishery. The descendants most commonly mentioned as having exercised such authority were Te Hiha's great-grandsons Tamaihikoia and Hēmi Te Miha, Tamaihikoia's son Ihu o te Rangi, and Tamaihikoia's nephew Te Hiko. This authority seems to have passed along the male line for the most part, although a number of the women of the family were said to have had an important role in the mid-nineteenth century. Wī Hutana, Te Hiko's son-in-law, went so far as to say that Te Hiha and his descendants were the

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[95] TMH, 15/10/1888, MB 9 p.367

[96] Raniera Te Iho to Native Department, 24/6/1876, MA 13/97, N.A.; E.S. Maunsell to Native Department, 20/4/1885, NLP 85/112, ibid.; Wairarapa Commission Report, p.29. See Chapter Six Hapū, whānau and personal fishing rights

only descendants of Te Rangitāwhanga to occupy the Wairarapa district, and that all the pā at the lake mouth were Te Hiha's,[97] but it may be more accurate to say that Te Hiha carried the mana of Te Rangitāwhanga at the lake mouth. Te Hiha is not credited with having exercised direct control at the lake mouth in the way that many of his descendants were. Hōhepa Aporo (a staunch rival of Te Hiha's descendants in the Native Land Court) denied that Te Hiha had inherited any at all of the mana that had been exercised at the lake mouth by Te Rangitāwhanga.[98] This may be because Te Hiha's mana was tarnished by being forced to flee at one point, and control of the lake mouth area became vested temporarily in Te Akitu o te Rangi of Ngāti Rongomaiaia.[99] Te Hiha was however eventually able to regain control of the whole area, and his mana over that area would have passed to his descendants until it was again shaken by the flight to Nukutaurua, when Te Āti Awa briefly assumed control of the lake mouth.[100]

The authority claimed on behalf of the descendants of Te Hiha seems to have related largely to the exercise of fishing rights at the lake mouth, as evidenced by their symbolic role in opening the fishing season. In the Tipua Mapunatea hearing, Hōhepa Te Wakiumu (Te Hiko's younger brother uterine) stated that:

> No-one attempted to put in their hinakes, until Tamaihikoia had placed his at the Tatai o Aronui [at the lake mouth] but this authority was confined to the small lake it did not interfere with the rights of other persons or hapus to the Large Lake.[101]

Wī Hutana claimed an identical right for Tamaihikoia's successor Te Hiko:

> As further proof of the authority held by Hiko over the Lake at Okourewa no one could go fishing there until he arrived and put in his pou. The only Tatai there was the one at the mouth called te Tatai o Aronui and no one attempted to fish there until Hiko arrived and opened the fishing.... The 'mana' of the late Hiko was of equal consequence as that of Tamaihikoia nui over the Lower and the Upper Lake.[102]

Even though this right of control was claimed by Te Hiha's descendants, they did not appear to be permanent residents at the lake mouth. Hōhepa said that Tamaihikoia lived at Kākahimakatea pā near Lake Ponui, and at Tūranganui (both inland from Lake Ōnoke), and went to the lake

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[97] TMH, 14/11/1888, MB 10 pp.60-61,67

[98] TMH, 23/10/1888, MB 9 p.442

[99] See page 193 *supra*, pages 268,270 *infra*.

[100] Wi Hutana, TMH, 14/11/1888, MB 10 p.67, 24/11/1888, p.175

[101] TMH, 17/10/1888, MB 9 p.404

[102] TMH, 14/11/1888, MB 10 pp.67-68

mouth to catch eels. Te Hiko occupied various places in the Wairarapa district at different times.[103] Thus their claim to control this fishery was based largely on the mana they had inherited from earlier ancestors.

While Te Hiko played a key role in the sale of the fishing rights in the lakes to the government in 1876, this cannot be taken as incontrovertible proof of his holding a sole right to deal with the lake mouth fishery as he wished. He was obviously favoured by government officials such as E.S. Maunsell, who regarded him as the guardian of the lakes, but this may have had as much to do with Te Hiko's willingness to co-operate as with his traditional status.[104] Even Maunsell acknowledged that some control over the lake mouth area was also held by Te Hiko's close female relatives Arihia Ngāwhawha and Hariata Amoahe.[105] Later on Te Hiko's right to sell the fishing rights on his own initiative was questioned by the 1891 Commission. Mackay articulated the contemporary Pākehā assumption that while a chief might have 'authority' or 'superior control' over land or a food resource, this was of a very indistinct nature and did not amount to a full proprietary right in the English sense; and thus a chief's role in the sale to Pākehā of such lands or resources should be that of an authority to be treated with, but one holding no more than an individual interest.[106]

Most of those not closely related to Te Hiko and his family considered that authority over the lake mouth was exercised by a larger group. Even Te Hiko's nephew Eruera Rangitakaiwaho questioned the assertion that eeling at the lake mouth could only begin once Te Hiko had placed his *hīnaki*.[107] Hōhepa Te Wakiumu told the Court that Te Hiko was not the only person of note amongst the Rākaiwhakairi hapū, although he and his immediate ancestors were

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[103] Hohepa Te Wakiumu, TMH, 17/10/1888, MB 9 pp.395-396; Hohepa Aporo, TMH, 26/10/1888, MB 9 p.482; Piripi Te Maari, TMH, 2/11/1888, MB 10 pp.13-14; Wi Hutana, TMH, 16/11/1888, MB 10 p.91, 12/3/1890, MB 13 pp.207-208, 13/3/1890, p.221; Judgment (Judge Mackay), Otaupuaroaro, 9/4/1890, MB 13 p.294

[104] E.S. Maunsell to Native Department, 24/3/1875, NO 75/1241, MA 13/97, N.A.; E.S. Maunsell to Native Department 15/2/1876, ibid.; cf. ND 76/613, ibid., where Piripi Te Maari is regarded as obstructive by Native Department officials because of his objection to the sale of the fishing rights in the lake; E.S. Maunsell, WMH, 13/11/1883, MB 4 p.129; TMH, 5/12/1888, MB 10 pp.278-290; Wairarapa Commission Report, p.33

[105] E.S. Maunsell to Under-Secretary at Native Department, 28/5/1885, NLP 85/143, MA 13/97, N.A.

[106] Wairarapa Commission Report, p.10

[107] TMH, 6/10/1888, MB 9 p.273

the best-known of them.[108] Te Kai o Te Kōkopu, another principal chief of Rākaiwhakairi, had a considerable interest in and control over the lake mouth area, as demonstrated by his ability to gift a large area of land in the vicinity. However, it is clear that the incoming Ngāi Tahu did not supersede other groups in the area, either on the land or at the fishery. According to Tunuiarangi of Ngāi Tahu, Te Kai o Te Kōkopu had control over his own area at the mouth of the lake, but he did not have a superior right over the whole Lake Ōnoke area. Tunuiarangi also stated that the hapū under Te Kai o Te Kōkopu and Ngāi Tahu had no need to ask Te Hiko's permission to fish at the lake mouth, implying that Te Hiko's rights of control did not extend to those hapū. Enoka Taitea of Ngāti Kahukuraāwhitia also stated that Te Hiko's permission was not needed to fish in the lower lake.[109]

A number of other chiefs were said to have had an interest in the lake mouth and its fishery. Piripi Te Maari, who lived near the mouth at Kohonui, stated that he was the principal claimant from Rakairangi, as well as having rights through descent from Tukoko and continuous occupation from his time. In making this claim, he did not deprecate the rights of those who traced their descent and rights from Te Rangitāwhanga, from whom he was descended himself. He strongly objected to Te Hiko claiming a paramount right over the lake ahead of himself and others.[110] In Maunsell's opinion, Te Hiko and Piripi's roles differed in that Piripi Te Maari (who was heavily involved in the practicalities of local land matters) was a *kaiwhakahaere* [an administrator or supervisor], but not the principal chief; whereas Te Hiko had an ancestral *take* to the land, but had not the *mana kaiwhakahaere*.[111]

In his evidence to Mackay's Commission, Te Whatahoro (also known as John Alfred Jury, born of a Pākehā father and Ngāti Moe mother), a knowledgeable but relatively disinterested witness with considerable experience as a representative of Land Court claimants, gave quite detailed descriptions of the various hapū that owned the portions of land around the shores of the lakes and the fishing rights that went with these. According to him, the western portion of the shore of Lake Ōnoke "was owned by" Ngāti Hineraumoa under Rāniera Te Iho, Hēmi Te Miha, Hohaia Te Rangi, Piripi Te Maari, Ngairo Rākaihikuroa, Ngāwhawha ki Te Rangi, Te

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[108] TMH, 15/10/1888, MB 9 pp.367-368

[109] Wairarapa Commission Report, pp.28-30. See also page 206 *supra*.

[110] Piripi Te Maari, WMH, 10/11/1883, MB 4 pp.122-123,126; E.S. Maunsell, TMH, 5/12/1888, MB 10 p.280

[111] Wairarapa Commission Report, p.33; 'Piripi Te Maari', PMP pp.203-205

Hiko and Wī Tamihana Hiko (Te Hiko's son); Ngāi Tahutāwhanga under Wheteriki Tuhirae; and Ngāti Whaitongarerewa under Kereopa and his brothers. The area around the western part of the bar was owned by Ngāti Te Rangitāwhanga under Te Hiko and Mitai Poneke. The eastern part of the bar and the eastern fringe of the lake belonged to Ngāti Tumanuhiri, under Rāniera Te Iho; and to Te Kai o Te Kōkopu, Ngāwhawha, Te Hiko, Hēmi Te Miha, and Maraea Toatoa. Te Whatahoro said that "each hapu was entitled to the land within the several boundaries described." Of all the chiefs mentioned, he listed Ngāwhawha, Hēmi Te Miha, Te Hiko, Rāniera Te Iho and Ngairo as the chiefs of rank.[112] It can be seen that some chiefs would have wider influence than others, due to the authority they had over a number of different hapū in different areas, but it seems unlikely that the rights of any individual or small group could override those of the whole group with an interest in the control of the lake mouth fishery.

Certain aspects of control, illustrating both the extent and the limitations of chiefly mana, can be exemplified with regard to the lake mouth fishery. For example, the act of gifting any land or resource implies sufficient mana on the part of the giver to make a gift of that size. When Te Rerewa transferred the lakes area to Te Rangitāwhanga and his followers he demonstrated his control over the land in question and its inhabitants. He also demonstrated the limits of his authority, as Te Rangitāwhanga's group had to negotiate separately with Te Whakamana in the areas in which he wielded control. The parting words attributed to Te Rerewa also imposed some conditions on the newcomers, namely that they were not to attack the remaining Rangitāne, thus leaving the shadow of Te Rerewa's mana to remain over the immigrants even after he himself had departed.[113] Similar principles underlay the gift of the mouth of the lake made by Te Kai o te Kōkopu to Te Hamaiwaho. Te Kai o te Kōkopu was able to gift the area because it fell under his control, but he was not able (even had he thought it desirable) to alienate the entire fishery based at the lake mouth. This was because the lake mouth fishery was worked by a large number of diverse groups, under numerous different *take*. Chiefs' rights to alienate property or resource rights were limited by the necessity of the consent of all the others with an interest in the resource being alienated, but they could invite others to share in any resource under their control. This is what Te Kai o te Kōkopu did when he made his gift, and Te Hamaiwaho

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[112] Wairarapa Commission Report, pp.29-30

[113] See pages 191-192 *supra*.

was also within his rights to invite his Ngāi Tahu relatives onto his new land once it had been passed to his control.[114]

The prevention of imposition on one's rights by others was also an essential element in the preservation of mana and in the maintenance of control. Violent disagreements over control were very uncommon at the lake mouth fishery. This is most probably because the resource was bountiful enough to admit almost anyone who wished to take part in the fishing. One of the few occasions when control over the lake mouth had to be affirmed was when Te Hiha was forced from the district by Ngāti Rongomaiaia.[115] Had he not fought to expel Ngāti Rongomaiaia, and proved his control had been regained by making certain gifts to his former enemies, his temporary loss of mana would have become permanent, and eventually the mana over his people in the area would also have passed to them.[116] The quarrel being between Te Hiha and Ngāti Rongomaiaia alone, the position of the other groups in the area, who saw no need to flee, would have remained unaffected. If however these uninvolved parties associated themselves closely with the invaders, they ran the risk of having their rights attacked by Te Hiha on his return.[117]

Derivation of rights in the upper lake fishery

The fishery in the upper lake differed in many respects from the fishery at the lake mouth. It was workable all year round, rather than being concentrated around two months of eel fishing; and it covered a large area of water, compared with the restricted area available at the lake mouth. The Wairarapa Moana North and Wairarapa Moana cases before the Native Land Court provided little detailed evidence of fishing rights in the main body of the lakes. The Tipua Mapunatea block boundaries touched on the lake shore north of where the Ruamāhanga River flows into the lake, and so some of the evidence given in that case discussed the ownership of the

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[114] Wairarapa Commission Report, p.28; see page 206 *supra*.

[115] See pages 193,210 *supra*.

[116] Hemi Te Miha, TMH, 2/10/1888, MB 9 pp.192-193; Kahu o te Rangi, TMH, 4/10/1888, MB 9 p.220; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 pp.245-246; Hohepa Te Wakiumu, TMH, 17/10/1888, MB 9 p.394; Wi Hutana, TMH, 13/11/1888, MB 10 pp.58-60,67, 15/11/1888, p.82, 19/11/1888, p.111, 24/11/1888, p.175; Judgment (Judge Mackay), TMH, 16/4/1890, MB 13 pp.322,329; see also page 268 *infra*.

[117] Hohepa Aporo, TMH, 23/10/1888, MB 9 pp.444,453,461-462; Wi Hutana, TMH, 21/11/1888, MB 10 p.144, 26/11/1888, p.181; Judge Mackay's Judgment, TMH, 16/4/1890, MB 13 p.322

lake and fishing practices therein. The Tipua Mapunatea case was also seen by local Māori as an opportunity for claims relative to the whole lake to be placed on record with the Court, and for rights to the lake to be stated publicly.[118] As with the lake mouth fishery, the most information regarding the allocation and use of fishing rights in Wairarapa Moana at that time is to be found in the report of and evidence given to Mackay's Commission in 1891.

The upper lake was included in the area given by Te Rerewa to Te Rangitāwhanga and others, with different areas being associated with each of the canoes involved in the transaction, so the lake and surrounding lands were divided amongst Te Rangitāwhanga and his followers at an early stage. The evidence of a number of people suggested that there were defined boundaries associated with these areas. The divisions were not equally made, with some of the incoming groups receiving land on both sides of the lake and the Ruamāhanga River, while others received land on only one.[119] Virtually all the claimants, no matter what their affiliations, agreed that Te Rangitāwhanga had a right to the upper lake, even if many believed that other ancestors also had a right. Paraone Pahoro made a claim for the lake based on ancestry and continued occupation from Te Rangitāwhanga, citing that ancestor's residence at and use of the lake for fishing, and many others did likewise.[120]

Several others of the migrant group were said to have obtained a right to parts of Wairarapa Moana. People from Ngāti Moe, including Hoani Te Taru, Paraone Pahoro, and Mānihera Rangitakaiwaho, put forward rights based on descent and occupation from Pōuri. Others placed Pōuri's share along the eastern shore of the lake, towards the north.[121] Kariwhare was another ancestor whose descendants traced claims for a share of the lake from him in the

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[118] Wi Hutana, TMH, 22/11/1888, MB 10 p.148

[119] Eruera Rangitakaiwaho, TMH, 27/9/1888 ,MB 9 p.170, 4/10/1888, p.222, 5/10/1888, pp.255-256, 8/10/1888, pp.279-280, 10/10/1888, p.312; Piripi Te Maari, TMH, 5/11/1888, MB 10 pp.28,46-47; Wi Hutana, TMH, 13/11/1888, MB 10 p.55; Wairarapa Commission Report, pp.29-30

[120] Paraone Pahoro, WMH, 8/11/1883, MB 4 p.117; Irihapeti Whakamairu, WMH, 13/11/1883, MB 4 pp.130-131; Piripi Te Maari, WMH, 10/11/1883, MB 4 p.123, 12/11/1883, p.126, TMH, 3/11/1888, MB 10 p.24, 5/11/1888, p.29; Manihera Rangitakaiwaho, WMH, 10/11/1883, MB 4 pp.123-124; Enoka Taitea, TMH, 11/10/1888, MB 9 p.319; Hohepa Te Wakiumu, TMH, 12/10/1888, MB 9 p.354, 17/10/1888, pp.393-394; Wi Hutana, TMH, 13/11/1888, MB 10 pp.54-55

[121] Hoani Te Taru, Wairarapa Moana North, 18/10/1882, MB 4 p.33; Paraone Pahoro, WMH, 8/11/1883, MB 4 p.117; Manihera Rangitakaiwaho, WMH, 10/11/1883, MB 4 pp.123-124; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 p.256

Court. Mānihera Rangitakaiwaho said he had "a claim" to the lakes, while Piripi Te Maari said that part of the lake "belonged to" Kariwhare and that he "possessed rights" to it. Both Eruera Rangitakaiwaho and Wī Hutana placed Kariwhare's land along the western shore of the lake.[122] The other migrant ancestors mentioned by a variety of claimants were Tutemiha, who had an area near that of Pōuri, around the eastern swampy fringes;[123] Tumai Te Uru, whose land was situated on the northern shore of the lake;[124] and Rakairangi, to whom was attributed the area to the east of Lake Ōnoke and the Ruamāhanga where it flowed between the lakes, and the south-eastern shore of the lake.[125] A few others were mentioned by some as having small claims along the lake shore.

A number of claimants also put forward certain Rangitāne ancestors as having continuing rights to the lake even after the arrival of Ngāti Kahungunu. The most significant of these ancestors were Te Whakamana and Te Rakaumoana. The undiminished mana of Te Whakamana (who was not involved in Te Rerewa's grant) was emphasized, as was the continuing occupation of the land by Rangitāne descendants, who were said to have occupied the land and fished in the lakes uninterrupted from that time.[126] While many or all of these people may also have been of Ngāti Kahungunu descent, their Rangitāne whakapapa was most important in the context of claiming the lake because their *tupuna* Te Whakamana's mana had been unimpaired, and they could trace a longer association with the lake from him.

The areas obtained by each ancestor were not necessarily passed down in their entirety to all their descendants. Some further subdivision of rights did take place, taking account of the expanding numbers of smaller hapū, linked to one or more of the larger and older hapū that had come to be associated with different parts of the lake. It was also claimed by Piripi Te Maari that

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[122] Manihera Rangitakaiwaho, WMH, 10/11/1883, MB 4 pp.123-124; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.24, 6/11/1888, p.47; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 p.255; Wi Hutana, TMH, 13/11/1888, p.55

[123] Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 pp.255-256; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.47; Wi Hutana, TMH, 13/11/1888, p.55

[124] Manihera Rangitakaiwaho, WMH, 10/11/1883, MB 4 pp.123-124; Wairarapa Commission Report, p.29

[125] Manihera Rangitakaiwaho, WMH, 10/11/1883, MB 4 pp.123-124; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 p.256, 8/10/1888, pp.279-280; Wairarapa Commission Report, p.29

[126] Manihera Maaka and Karaitiana Korou, WMH, 12/11/1883, MB 4 p.125; Matenga Ruta, WMH, 13/11/1883, MB 4 p.127; Marakaia Tawaroa, WMH, 13/11/1883, MB 4 p.128; Chrisp, pp.53,57

Te Rangitāwhanga's portion of the lake was divided further amongst his descendants.[127] This would explain why Wī Hutana regarded the lake as being in the possession of only five hapū, while Te Whatahoro gave the names of considerably more groups. Each area belonging to one of the large hapū would often be divided further amongst the smaller hapū, often no more than extended families, which formed part of each major hapū.

Unlike the lake mouth area, the lake shores and waters appear to have been divided into areas owned and worked largely by a single hapū or a few small related hapū. In the Wairarapa Moana North case, Mānihera Rangitakaiwaho stated that in the upper lake, "I hold the same as the other chiefs there are some 30 chiefs but I believe there are about 500 other owners. In the lower lake they are about the same and some of the chiefs own a larger share."[128] Te Whatahoro gave a comprehensive description of the areas of land possessed by the various hapū at that time in his evidence to Mackay's Commission. He divided the lands around the upper lake into a number of regions, identifying each of the larger hapū to whom the land "belonged". He named the chiefs associated with each hapū and area, many of whom were mentioned as representatives of more than one hapū, in different areas. Some areas were also said to belong to more than one hapū.[129] His evidence highlights how hapū rights flowed into each other through shared land, whakapapa and leadership. While Te Whatahoro named about fifteen different hapū, Wī Hutana named only five hapū as having rights to the upper lake — Ngāti Hineraumoa, Ngāti Hinetauira, Ngāti Rakairangi, Ngāti Kura, and Ngāi Tukoko.[130]

An individual could also gain a right to fish in the upper lake through being invited to do so by those who had control over part of the lake fishery. The best-documented gift of fishing rights in the upper lake is that made by Te Hiha to Muretū. Muretū was the son of Te Rangituinomotu, and when Te Hiha reconquered the areas that Te Rangituinomotu had taken, and killed him, Muretū prepared to leave the district.[131] Eruera Rangitakaiwaho told the Tipua

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[127] TMH, 5/11/1888, MB 10 p.29

[128] Wairarapa Moana North, 26/10/1882, MB 4 p.45

[129] Wairarapa Commission Report, pp.29-30; Eruera Turei [Rangitakaiwaho], TMH, 4/3/1890, MB 13 pp.132-133

[130] TMH, 14/11/1888, MB 10 p.67

[131] Matiaha Mokai and Tutepakihirangi, Maramamau, 13/8/1867, MB 1 pp.146-147; Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 pp.245-246; Piripi Te Maari, TMH, 2/11/1888, MB 10 p.8; Wi Hutana, TMH,

Mapunatea hearing how Te Hiha offered lands and fishing rights to Muretū in the northern lake area in order to induce him to remain:

> Te Hiha was told of Muretu's intention and he directed Taurae to retain him and as an inducement for him to stay to offer him land at Te Wakawahi and to dig fern root at Maramamau and procure food at Wairarapa Moana.
> Muretu consented to stay.[132]

These occupation and resource rights were passed down to Muretū's descendants after his death, and the gifted land was eventually sold by them. The *take* of the chief Wī Kingi to the lake was derived in part from the gift of fishing rights in the lake to Muretū.[133]

Relationships between land, waters, and fishing rights in the upper lake

The division of the lake shore between the various hapū was important in the exercise of fishing rights, because the general opinion of those who gave evidence to the Native Land Court and the 1891 Commission was that authority over land and water was conjoint, and the right to fish in the upper lake was closely associated with the corresponding stretch of shoreline. This association between land and water was recorded to date from at least the Ngāti Kahungunu migrants, whose rights, according to Mānihera Rangitakaiwaho, extended "both [to] the lakes and the land adjoining the water."[134] Tunuiarangi told Mackay's Commission that "[t]he chiefs and hapus who owned the land on the banks of the lake had also a right to a portion of the lake opposite their respective localities."[135] Hōhepa Te Wakiumu also referred to this aspect of fishing rights in the lake: "His [Te Hiko's] rights extended as also did Ngawhawha['s] from the water to the land and so did that of others."[136] The authority over land and water would seem to be conjoint, one not necessarily being the source of the other. While Tunuiarangi implied that the

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13/11/1888, MB 10 pp.59-60, 26/11/1888, p.189; Judgment (Judge Mackay), TMH, 16/4/1890, MB 13 p.322; Wairarapa Commission Report, p.29

[132] TMH, 5/10/1888, MB 9 pp.245-246

[133] Wi Hutana, TMH, 13/11/1888, MB 10 p.60; Wairarapa Commission Report, p.29

[134] Manihera Rangitakaiwaho, WMH, 10/11/1883, MB 4 p.124; Wi Hutana, TMH, 14/11/1888, MB 10 p.68; Wairarapa Commission Report, pp.29-30

[135] Wairarapa Commission Report, p.29

[136] TMH, 15/10/1888, MB 9 p.368

chiefs obtained their rights over the water from the ownership of the adjoining land, Hōhepa and Mānihera implied the reverse.

Some used the act of catching fish from the lake as evidence to reinforce their claims of ownership of blocks in the Native Land Court, fishing being seen as a major sign of occupation. Hoani Te Taru, a claimant in the Wairarapa Moana North case, set out his claim as follows: "I claim an interest on behalf of Ngatihamutu hapu I am one of that hapu. I claim from ancestry and occupation we have caught fish and birds on the lake."[137] In the Wairarapa Moana case, counter-claimant Paraone Pahoro made "a claim to the lakes" through descent from Te Rangitāwhanga: "Te Rangitawhanga is the ancestor. He lived on the land adjacent to the lakes, he was cultivating there (or rather used to catch eels and fish there and birds such as Ducks and swamp hens)."[138] However, in neither of these cases was a claim to the lake put forward solely on the basis that fishing rights had been exercised there. Rather, the exercise of a fishing right (or any other right to use the resources of the land) was seen as a reinforcement of the twin bases to claims of ancestry and (more especially) occupation. This is at least partially the result of Land Court procedures, as Pākehā judges considered rights derived from ancestry and continued occupation to be of more weight than those put forward on the basis of the ongoing exercise of a non-residential resource right.[139] The preference given by the judiciary to the exploitation of land resources (as opposed to fishing resources) as a sign of occupation may be reflected in Paraone Pahoro's description of Te Rangitāwhanga's fishing rights in the lake as his 'cultivations'; although this may also be a result of the Court translator rendering a general term such as '*mahinga kai*' in a more precise (and inaccurate) way in English.

In unusual circumstances, fishing rights could be exercised in the upper lake independent of a corresponding occupation right on the lake shore. Such practices were common at the lake mouth, given the wide range of people who relied on *take whanaunga* there rather than *take tupuna*. These *take whanaunga* rights were most probably exercised in the upper lake also, but given the paucity of detail regarding the day-to-day exploitation of the upper lake fishery, very little written evidence for such practices is to be found in either the Land Court proceedings or

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[137] Wairarapa Moana North, 18/10/1882, MB 4 p.33

[138] WMH, 8/11/1883, MB 4 p.117

[139] *e.g.* see Judgment (Judge Mackay), Otaupuaroaro, 9/4/1890, MB 13 pp.290-296

Mackay's Commission evidence. One of the few instances related to the Court was that of Marakaia Tawaroa of Rangitāne, who said:

> I claim through my Ancestors as follow viz. Te Whakamana & Te Raikaumoana.... From Whakamana's to Raua's time we have lived there [near the Lake]. I was born up at the head of the Valley. I was never a permanent resident at the lakes, but went there for fishing &c.[140]

Another example of a non-residential fishing right being exercised in the upper lake was that of Muretū, who received a right to fish in Wairarapa Moana (and rights to use other nearby food resources) from Te Hiha without receiving a corresponding stretch of shoreline, although he did receive other lands in the vicinity.[141]

While there was a clear association between the shores of the upper lake and fishing rights in the adjoining waters, the seasonal nature of the Wairarapa fisheries meant that people routinely travelled to use different fishing resources. The alternation between the autumn lake mouth eel fishery, and other fisheries and food gathering areas, made the exploitation of fishing resources in both the lakes and the swamps a seasonal operation. This seasonal round of temporary occupations and operations was an accepted aspect of fishing rights, and people had rights through the migrant *tūpuna* in both the upper and lower lakes. Paraone Pahoro told the Court: "It is a matter of no consequence a person shifting his occupation from place to place he does not lose his right to the several places he has left."[142] This statement was reinforced by other claimants who stressed that occupation of many areas was seasonal, and reliant on the resources of that area being in season.[143] The seasonal cycle seems to have been a long-established feature of the Wairarapa fisheries — Eruera Rangitakaiwaho told of the different places visited by the Ngāti Kahungunu migrant Tutemiha and more recent ancestors during the eeling season.[144]

The resources exploited by any particular individual or group could cover substantial areas and many different types of resources. Ngāti Rakairangi used to range over an area

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[140] WMH, 13/11/1883, MB 4 p.128

[141] See pages 217-218 *supra*.

[142] TMH, 27/3/1890, MB 13 p.265

[143] Ramari Eramiha, TMH, 28/3/1890, MB 13 p.272; Judgment (Judge Mackay), Otaupuaroaro, 9/4/1890, MB 13 p.291; Wairarapa Commission Report, p.18

[144] TMH, 6/10/1888, MB 9 pp.259-260

encompassing the lake mouth, the Ruamāhanga, the swamps around the Mapunatea area, and the hills to the east of the upper Ruamāhanga.[145] Hōhepa Aporo, of this hapū, told the Court that "in the summer time the people used to live in the vicinity of the lagoons for the sake of the eels and in the winter they went to Maungaraki [to the east of present-day Carterton] to catch birds."[146] Other individuals carried out a seasonal rotation across a much smaller area, relying solely on fish and eels. After the return from Nukutaurua, Ramari Eramiha went with her father Te Watarauhi to Te Hemingi to catch eels in season, and she told how her father also went fishing to Tūranganui and to Te Upokokirikiri at the lake mouth.[147]

The seasonal rotation also allowed for the exploitation of resources derived from more than one of a person's descent lines, especially where these were scattered over a wide area and were productive at different times of the year. The preference for fresh food to be available for as much of the year as possible would also have made it important that rights were exercised regularly (and thus maintained) in as many areas as possible. Therefore, if a woman continued to fish at her old home after her marriage, her children could also participate in this fishery, and so on.[148] The maintenance of a range of rights was especially beneficial in the Wairarapa, where the annual fluctuation in the lake level provided good fishing at different places on the lake shores at different times of the year, depending on the water height, and culminated in a highly profitable fishing season at the lake mouth in autumn.

Management and control of the upper lake fisheries

Most of the chiefs who claimed a measure of control over the upper lake and its fisheries have already been mentioned in connection with the hapū which occupied and utilized the lake and its shores. The carefully defined hapū areas around the upper lake (as enunciated by Te Whatahoro and others) suggest boundaries were more clearly delineated on the upper lake than on the lower. As the resource was relatively insignificant compared with that of the lower lake and the lagoons and streams to the east of the lakes, control of the Wairarapa Moana fishery

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[145] Hohepa Aporo, TMH, 23/10/1888, MB 9 pp.436-437,447,472; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.21

[146] TMH, 23/10/1888, MB 9 pp.436-437

[147] TMH, 28/3/1890, MB 13 p.269

[148] Eruera Rangitakaiwaho, TMH, 6/10/1888, MB 9 p.264; Ballara, p.398; Gaela Mair, p.22

seems to have been much less keenly contested than that of the other two areas. However, some of the chiefs held a larger interest than others, through affiliation to a number of hapū holding different parts of the lake, or through their personal mana. Control over the lake and its fishery was largely derived by descent from an ancestor who had exercised control or had mana over the lake, especially from the original migrant ancestors. Eruera Rangitakaiwaho, appearing for Rākaiwhakairi and Ngāti Kahukuraāwhitia, told the Land Court that "[t]he 'mana' o te whenua was derived through the gift of the canoe [given by Te Rangitāwhanga *et al.* to Te Rerewa] and the descendants of these ancestors derive their rights from that source."[149]

As with the lower lake, a superior controlling interest was claimed for Te Hiko and his immediate family, the descendants of Te Hiha. Te Hiko claimed two separate *take* to the lake, from Rangitāwhanga and Kariwhare.[150] On some occasions, it was claimed that the family's ancestral interests from Te Rangitāwhanga and Te Hiha had been bolstered by Te Hiha's re-conquest of the upper lake from Rangituinomotu.[151] Ani Hiko stated in the Wairarapa Moana North case that "[m]y father had a large interest larger than other chiefs.... I have the great mana." This position was reinforced by the deaths of Arihia Ngāwhawha and other close relatives of hers who were also descended from Te Hiha, and who had shared in the interests of the family in the lake.[152] Te Hiko was undoubtedly a chief of great mana in the area, and he was believed by many to hold the highest mana amongst the Wairarapa chiefs, even if he did not have control over the lakes to the exclusion of all others.[153]

Te Mānihera Rangitakaiwaho disputed this view, listing Hoani, Ngairo, Hore Taha, Ruihi Te Miha and Wī Kīngi as chiefs who had a considerable interest in the lake alongside himself and Te Hiko.[154] Enoka Taitea gave a similar list, also including Ngāwhawha and Rāniera

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[149] TMH, 5/10/1888, MB 9 p.255

[150] Piripi Te Maari, TMH, 2/11/1888, MB 10 p.7

[151] Hohepa Te Wakiumu, TMH, 12/10/1888, MB 9 p.354; Wi Hutana, TMH, 14/11/1888, MB 10 pp.66-67, 22/11/1888, p.156

[152] Ani Hiko, Wairarapa Moana North, 26/10/1882, MB 4 p.47; Hohepa Te Wakiumu, TMH, 15/10/1888, MB 9 pp.367-368

[153] Kahu o te Rangi, TMH, 4/10/1888, MB 9 p.221; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.24; Wi Hutana, TMH, 14/11/1888, MB 10 p.68; E.S. Maunsell, TMH, 5/12/1888, MB 10 p.280, Wairarapa Commission Report, p.33

[154] Wairarapa Moana North, 26/10/1882, MB 4 p.45

Te Iho, in his evidence to Mackay's Commission.[155] Others (including some not of his hapū, and E.S. Maunsell) confirmed that Wī Kīngi held an important position, especially at the northern end of the lake where he was the premier chief.[156] The Rangitāne claimants also seem to have retained some control at the northern end of the lake, where the descendants of Te Whakamana had not been completely overrun by Ngāti Kahungunu and had remained in control of their lands and fisheries.[157] In his judgment on the Wairarapa Moana North case, Judge Brookfield ordered seventeen undivided interests to be issued for the lake, only six of which went to Te Hiko and his close relatives.[158]

Even if chiefs were said to have mana or control over the lake fishery, this did not give them *carte blanche* to deal with the fishery as they would. Mānihera Rangitakaiwaho's statement that the lake was owned by about 500 persons under 30 chiefs[159] indicates that the entire community was considered to have some form of proprietary rights over the lake, even if these were under the overright of the hapū and the leadership of the chiefs; they were not seen as strictly personal rights. The *rangatira* had *mana whenua* over the land, handed down from their ancestors, but their status as *rangatira* was also dependent on having *mana tangata*, derived from their own leadership qualities and the ongoing support of the people.[160]

The forceful exercise of *mana tangata* could override the interests of the lesser owners, but only on sufferance, as was indicated by the reaction to Te Hiko and Hēmi Te Miha's sale of the fishing rights in the lake in 1876. While a number of individuals closely related to those two supported their right to alienate the lake fishery on their own initiative,[161] many others objected but were hindered in voicing or acting upon their objections by the great personal standing of Te

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155 Wairarapa Commission Report, p.30

156 Komene Piharau, Wairarapa Moana North, 26/10/1882, MB 4 p.46; E.S. Maunsell, TMH, 5/12/1888, MB 10 p.280; Wairarapa Commission Report, pp.28-30

157 Manihera Maaka, WMH, 12/11/1883, MB 4 p.125; Marakaia Tawaroa, WMH, 13/11/1883, MB 4 p.128; Chrisp, pp.53,57

158 Wairarapa Moana North, 26/10/1882, MB 4 p.47

159 Wairarapa Moana North, 26/10/1882, MB 4 p.45

160 Cleve Barlow Tikanga Whakaaro: Key Concepts in Maori Culture Auckland: Oxford University Press, 1991, pp.60-62; Joan Metge In And Out of Touch: Whakamaa in a Cross Cultural Context Wellington: Victoria University Press, 1986, pp.62-73; Mutu pp.60-61; Report of the Waitangi Tribunal on the Orakei Claim (Wai-9) Wellington: The Tribunal, 1987, p.133. See page 11 *supra*.

161 Kahu o te Rangi, TMH, 4/10/1888, MB 9 p.221; Paratene Matenga, TMH, 29/11/1888, MB 10 pp.221-222

Hiko and Hēmi. Maunsell telegraphed the Native Department at the time of the fishing rights sale: "Great excitement with the Natives on account of Hikos sale. I have met and explained to them the feeling in the Lower Valley that lake purchase is concluded, none dare personally complain to Hiko, his dictum is recognized by all as binding."[162] A further communication from Maunsell explained why there had been such opposition to Te Hiko and Hēmi's actions:

> ... the strong feeling which existed ... against Hiko's and others sale of the fishery rights in the Lake has subsided ... that feeling would not have arisen had not Hiko entirely ignored their claims or their right to interfere with his 'mana' over the Lakes.[163]

As the sale of the lake fishing rights occurred well into the contact period, it cannot be taken as a flawless exemplification of the workings of customary power structures relating to fishing rights, but it does give some indication of the extent of chiefly control with regard to actions affecting a whole fishery. There was considerable opposition to Te Hiko and Hēmi's actions, but the disaffected did not possess sufficient authority to prevent them, perhaps because the introduction of Christianity dissuaded people from responding with armed force, as was the norm in pre-contact times.

Chiefs had much clearer rights to gift or allocate small parts of the lake and its associated fishing rights. The gift made by Te Hiha to Muretū served to reinforce the fact that Te Hiha had reconquered the Wairarapa region, and had restored his former influence sufficiently to make such an allocation of resource rights and lands to a newcomer.[164] Piripi Te Maari gave the Court in the Wairarapa Moana case a more general description of the powers of the chiefs in this respect: "Any other tribes who have resided here, have done so with the sanction only of the rightful owners."[165] Taken in conjunction with the Muretū case, this communicates both the role of the chief in inviting others to share in the resource of the group (an expression of his rights of control), and also the role of the chief's people in providing approval (albeit tacit) for such actions, as the chief could not generally dispose of a resource in which they had a share without their approval. Both the chiefs and the people are encompassed within Te Maari's phrase "rightful owners", and both had defined but different roles in the control of resources

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[162] Maunsell to Native Department, 18/2/1876, MA 13/97, N.A.

[163] E.S. Maunsell to Native Minister, 7/9/1879, NO 79/3608, MA 13/97, N.A.

[164] Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 pp.245-246. See pages 217-218 *supra*.

[165] WMH, 10/11/1883, MB 4 p.123

The Wairarapa Moana fishery — a summary

The Wairarapa Moana fishery is characterized by a sharp contrast between the fishery at the mouth of Lake Ōnoke and that in the main body of Wairarapa Moana. The lake mouth fishery was an extremely high yield seasonal fishery concentrated in a very small area; while the main lake fishery was much more widely spread out and could be fished over the whole year, but it was much less productive than the lake mouth fishery. These distinctions between the two fisheries were reflected in the differences in the way in which fishing rights were presented to the Native Land Court and Mackay's Commission.

The major similarity between the two fisheries was the tracing down of fishing rights from the key ancestors of the Ngāti Kahungunu migration, especially Te Rangitāwhanga and his subsequent descendants. Most people traced their *take tupuna* from Te Rangitāwhanga and his companions, and reinforced their claims to rights with proof of *ahi kā* from his time onwards. However, the Ngāti Kahungunu ancestors were not the only ones put forward, and some people preferred to trace their fishing rights from their Rangitāne ancestors, who had lived in the area before the arrival of Ngāti Kahungunu and who had never been driven away.

The lake mouth fishery provides ample evidence that *ahi kā*, or continued occupation, need not always be equated with permanent physical presence at the resource in question. As a seasonal fishery, it was used for only a few months each year, and at other times many of those with *take tupuna* there lived elsewhere in the Wairarapa district. Their *ahi kā* was preserved by returning each year to participate in the lake mouth fishery. Because of the richness of the fishery, it was viable for it to be open to large numbers of people, and disputes over who had a right to fish appear to have been rare. It was also very common for people to use the lake mouth fishery even when they had a weaker connection with it. Many people used the lake mouth fishery through *take whanaunga* or the rights of their relatives, and fished at the lake mouth because of their family links or friendship with those who had an indisputable right to fish there.

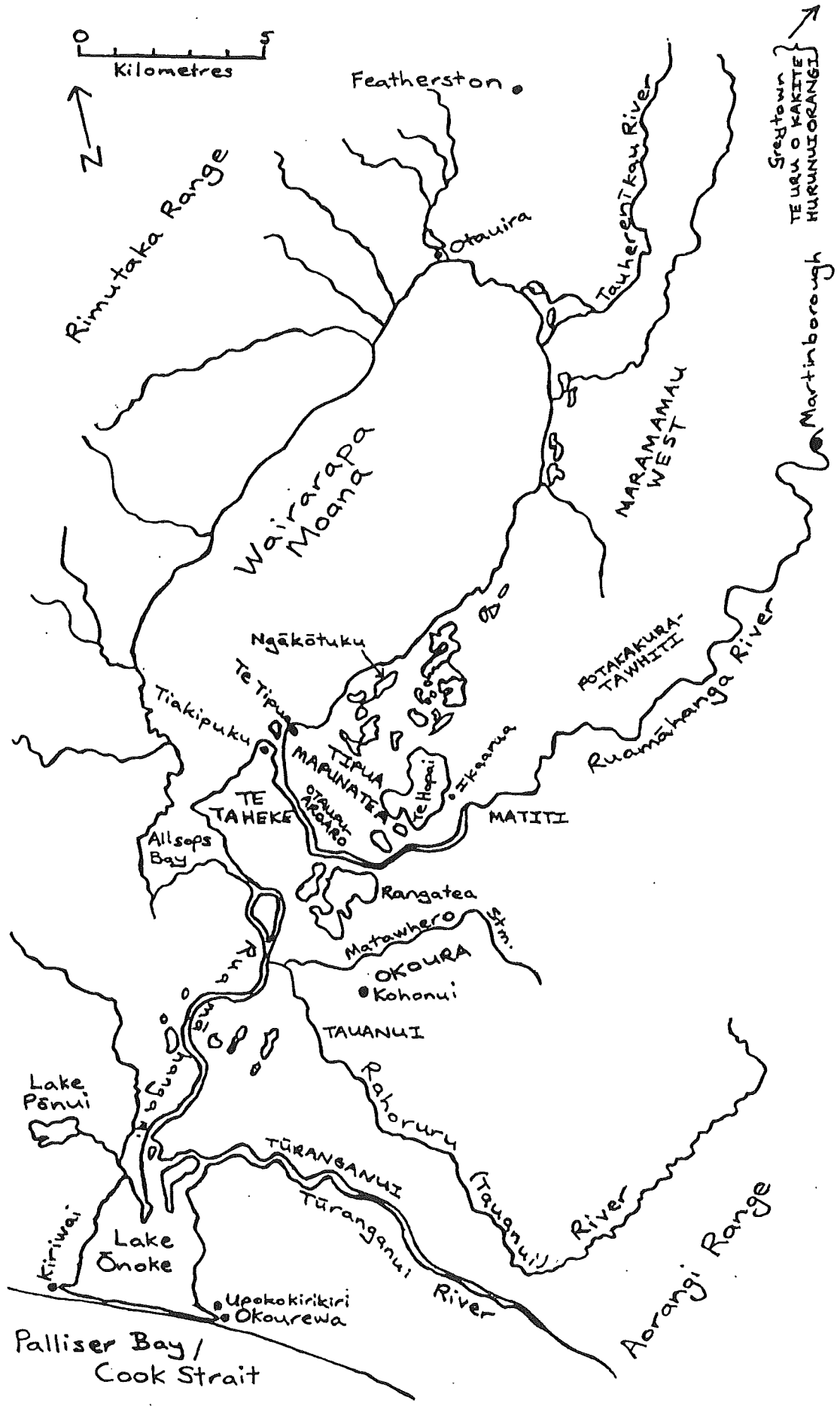
While access to the lake mouth fishery was open to all those who could demonstrate *take tupuna* and *ahi kā*, and the presence of others with a lesser connection was usually tolerated, rights to control the lake mouth fishery were much more tightly restricted. The evidence given by the people most closely associated with the lake mouth fishery suggested that a limited number of leading chiefs had control over the regulation of the fishery. Most were agreed that symbolic control of the fishery had been vested in the leading chief Te Hiko Tamaihikoia and his predeces-

sors, the inheritors of Te Rangitāwhanga's mana. They were the people who opened the fishery each year, but other leading chiefs refuted any suggestion that their exclusive rights went beyond that. Most other chiefs said that they did not need Te Hiko's permission to use the fishery, and that they themselves were able to direct their own hapū and invite others to share the fishery.

With the upper lake being a much less valuable fishery, there was less debate on the subject of overall control, and more emphasis on the division of the lake and its fishing rights amongst the various hapū living on its shores. Most of the people who discussed the upper lake fishery talked about these divisions, whereas at the lake mouth no divisions were observed. Particular portions of the lake were generally associated with one or more hapū, and with the chiefs and other leading people of those hapū. The evidence of Mānihera Rangitakaiwaho and others suggests that all those who belonged to these hapū were considered to be joint 'owners' of the upper lake.

There was a clear connection made by both Wairarapa Māori and Pākehā commentators between the occupation of the land on the shores of the upper lake, and the right to fish in the waters adjoining that land. The relationship between the land and the water was regarded as a balanced one, with rights over the waters not necessarily being considered only a part of the bundle of rights over the adjacent land, or vice versa. However, the Native Land Court preference for land occupation over fishing rights as proof of ownership appears to have encouraged some people to use their fishing rights on the lake as further proof of their rights to the adjoining land. The evidence given to Mackay's Commission was not constrained by this consideration, and the exercise of a fishing right in the lake was presented as part of the package of rights exercised by those hapū with an ancestral right to occupy a certain portion of the lake and its shores.

Map 2 Wairarapa Moana (lake margins *circa* 1890)



CHAPTER SIX

The Wairarapa Lake Fringe Fishery

Money is not a good friend it causes strife, Tuna's do not cause strife in that way because they are more easily obtained, but money is different.[1]

The lake fringe fisheries[2]

The swampy fringes to the east of Wairarapa Moana were interspersed with numerous lagoons, ponds and streams, especially before the 1855 earthquake. A number of rivers, including the Tauherenīkau, Ruamāhanga, Rahoruru and Tūranganui, also cross the area. A number of different fishing methods were used in the stream and lagoon fisheries, which could be fished all year round. Mention is made of nets being used in some lagoons, and *hīnaki* were also used to capture eels as they swam about.[3] Ahitana Mātenga of Ngāti Kahukuraāwhitia, a witness in the Tipua Mapunatea hearing with a strong interest in the land, described the different fishing methods used in the swampy fringes around Wairarapa Moana and the Ruamāhanga River:

> A pa tuna is made in a Stream.
> A wakarau is made in a place where the flood is likely to reach.
> A puarere is made in a lagoon.... A wakarau is only made in a suitable place.
> The Wakarau is about five chains off the Pa at Te Turi o te Hautumoa.
> The water when the country was flooded would be close to the ridge on which the pa stood.
> The people would remain so long as the water was low enough to work that wakarau, and then would shift to higher ground.[4]

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1 Evidence of Enoka Taitea, Tipua Mapunatea Hearing [TMH], 11/10/1888, Wairarapa Native Land Court Minute Book [MB] 9, p.322

2 This chapter ought to be read in conjunction with the first part of the previous chapter, which outlines the history of the settlement of the area (by both Māori and Pākehā), and the work of the Native Land Court and 1891 Mackay Royal Commission in the Wairarapa district, from which the bulk of the evidence for this chapter is drawn.

3 Eruera Turei [Rangitakaiwaho], TMH, 1/3/1890, MB 13 p.114; 'Commission of Enquiry into Claims of Natives to Wairarapa Lakes and Adjacent Lands' AJHR 1891 G-4, pp.12,19

4 TMH, 8/3/1890, MB 13 pp.171-172

The *pā tuna* is a method used by Māori throughout New Zealand to catch eels, and comprises a weir or weirs which channel the eels into a *hīnaki*. It could be used with the current running downstream, as normal, or upstream, as the lake levels rose. The normal meaning of *puarere* is that of 'decoy bird', but in this context it may mean a baited eel trap, as there is a similar word, *pūarero*, which means a funnelled eel trap or *hīnaki*. In a lagoon there would be no current to funnel eels into a *hīnaki*, and non-migratory eels (the only sort to be found in a pond) will readily take bait. No-one in the Wairarapa further explained what a *wakarau* was, or how it worked, but elsewhere the term *whakarau* referred to fern fences or bracken mats placed in the water, into which eels and other fish would swim for shelter. The bracken would then be lifted and the fish taken from them. South Island ethnographer Herries Beattie also recorded that in Canterbury, a *whakarau tuna* was simply "a place where eels could be captured."[5]

The most important and by far the most comprehensive Native Land Court case to cover this area was the investigation of the Tipua Mapunatea block, heard over three months in 1888 and 1890 by Judge Alexander Mackay.[6] Mackay heard almost all the cases dealing with the fisheries in the lake fringes, including Tipua Mapunatea, its Otaupuaroaro subdivision, and nearby Matiti. While the Tipua Mapunatea Block itself only enclosed about 3500 acres around the upstream confluence of the Ruamāhanga River with Wairarapa Moana, the case brought forth a great deal of evidence relating to the entire Wairarapa district, with special reference being made to the many areas of similar terrain which lay close to the block in question. Other Land Court cases which dealt with fishing rights in the Ruamāhanga River to the north of this area include the Maramamau Block, the Hurunuiorangi Block, and the Patakakurawhiti Block.[7]

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5 R.M. McDowall New Zealand Freshwater Fishes: A Natural History and Guide (2nd ed.) Auckland: Heinemann Reed, 1990, pp.410-411; Herries Beattie Maori Place Names of Canterbury Dunedin: Otago Daily Times, 1945, pp.62-63

6 MB 9 pp.162ff.; MB 10 pp.1ff.; MB 13 pp.101ff.

7 Maramamau, 23-24/7/1866, 12-16/8/1867, MB 1 pp.121ff.; Hurunuiorangi, 29/3/1869, MB 1H pp.103ff.; Patakakurawhiti, 15-17/8/1888, MB 8 pp.317ff.; Matiti, 15-21/12/1888, MB 11 pp.2ff., Judgment, 16/4/1890, MB 13 pp.330-337

Ancestral rights to fishing resources in the lake fringe area

The judgment made in the Tipua Mapunatea case ruled that a small subdivision of the block, known as Otaupuaroaro, belonged to the Ngāti Kahukuraāwhitia party who had claimed on behalf of themselves, Ngāi Tuawhio, Ngāi Tuwakatake, Ngāti Kamuku, Ngāti Uhu and Ngāti Komuka. All these hapū traced their descent from a small, closely related group of ancestors. This was disputed by the descendants of Te Hiha, who claimed the area themselves. Judge Alexander Mackay concluded that both groups had used the area (which was so swampy that it was unsuitable for occupation) and that there were no clearly defined boundaries between their interests.[8] The Tipua Mapunatea Block as a whole had been claimed by Ani Hiko and others of Ngāti Te Hiha. The three sets of counter-claimants were Hēmi Te Miha on behalf of Rākaiwhakairi; Ngāti Kahukuraāwhitia and Rākaiwhakairi under Eruera Rangitakaiwaho; and Ngāti Rakairangi and Ngāti Hinetauira under Hōhepa Aporo. Ani Hiko and Hēmi Te Miha both derived their rights from descent from Te Hiha, with Hēmi Te Miha basing his case on descent from Te Hiha's grand-daughter Hinetārewa. Judge Mackay rejected Hēmi Te Miha's case because occupation had not been maintained by her descendants after Hinetārewa left the district, nor had fishing rights been kept up. Hōhepa Aporo's party's case was rejected because of fundamental inconsistencies in evidence meant to prove the length of their ancestors' association with the land. Eruera's party received the Otaupuaroaro Block as outlined above, and Ani Hiko and her party were awarded the remainder of the land by descent from Te Hiha and Te Rangitāwhanga.[9]

Native Land Court judgments did not always accurately reflect the actual state of traditional 'ownership', especially in cases such as this one where there was a huge complexity in patterns of land and resource use. As the main use of the area was for fishing, judges also struggled to reconcile Pākehā views on the primacy of physical occupation and land cultivation as signs of ownership with the contrary evidence given them by Māori. However, with those difficulties taken into account, in this case the judgment is largely representative of the evidence

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[8] Judgment, Otaupuaroaro, 9/4/1890, MB 13 pp.286,288-289,291

[9] Judgment, TMH, 16/4/1890, MB 13 pp.310-311,323,325-327,329-330

presented, which was incredibly detailed throughout and complicated by the close relationships existing between many people from the opposing claimant groups.[10]

Like Wairarapa Moana, the area to the east of the lake was derived from a number of ancestors, and the early land apportionments continued to be significant when it came to considering later fishing rights. However, as Judge Mackay put it:

> The [Tipua Mapunatea] case throughout has presented unusual difficulties owing to its early occupation being mixed with the history of the occupation of the whole of territory acquired by Te Rangitawhanga and those who came with him.[11]

Thus there was a reasonable degree of dispute over which ancestors had owned, been given, or occupied the land. Ngāti Kahukuraāwhitia claimed the area around Otaupuaroaro by descent from Tamaamio and Te Rangitāwhanga, and also from "the purchase of the land by Tutemiha by the payment of a canoe." They considered Te Rangitāwhanga's *take* to be derived through his relationship to his uncle Tamaamio.[12] Ani Hiko's party disputed Ngāti Kahukuraāwhitia's claim from Te Rangitāwhanga, as they claimed the whole Tipua Mapunatea Block from him themselves. Hēmi Te Miha claimed from a subsequent descendant of Te Rangitāwhanga.[13] Hōhepa Aporo's group based their claim on descent from Rakairangi and Te Rangitāwhanga's mother Hinetauira, but the claim from Rakairangi was rejected out of hand by the Court and the other claimants.[14]

Numerous succeeding ancestors who had exercised some sort of ownership or user right over the land were also advanced to the Court by various parties claiming *take tupuna*, but

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[10] Throughout this chapter, evidence from cases rejected by the judge has been used alongside evidence from successful parties, as those whose claims were disputed by other parties on factual grounds nevertheless presented their evidence within an orthodox framework. See page xxv note 4 *supra*.

[11] Judgment, Otaupuaroaro, 9/4/1890, MB 13 p.290

[12] Eruera Rangitakaiwaho, TMH, 27/9/1888, MB 9 pp.168-171, 4/10/1888, pp.222-223, 9/10/1888, pp.294-295, 3/3/1890, MB 13 pp.116-117; Hohepa Te Wakiumu, TMH, 15/10/1888, MB 9 p.363; Ngati Kahukuraawhitia Claim, 9/4/1890, MB 13 p.286, 16/4/1890, pp.310-312,323-324; see pages 190-192 *supra*.

[13] Hemi Te Miha, TMH, 2/10/1888, MB 9 p.185; Kahu o te Rangi, TMH, 3/10/1888, MB 9 pp.207-209; Hohepa Aporo, TMH, 25/10/1888, MB 9 p.470; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.24, 5/11/1888, p.37; Ngati Te Hiha Claim, Otaupuaroaro, 9/4/1890, MB 13 p.289; Ngati Kahukuraawhitia Claim, TMH, 16/4/1890, MB 13 pp.310-311; Claimants' Statement of Case, 16/4/1890, MB 13 pp.316,319

[14] Hohepa Aporo, TMH, 27/9/1888, MB 9 p.175, 23/10/1888, pp.435-436,440, 16/4/1890, MB 13 p.314; Hemi Te Miha, TMH, 2/10/1888, MB 9 pp.184-185, 16/4/1890, MB 13 p.311; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.24, 5/11/1888, p.35; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 p.318; Judgment, TMH, 16/4/1890, MB 13 pp.325-326

virtually all of these had some connection with the original Ngāti Kahungunu migrant *tūpuna*. Another difficulty with relying on evidence produced by the Native Land Court process is that it encouraged claimants to discuss hapū ownership of fairly large areas, rather than considering more detailed property rights held over smaller areas. This is less evident in the Tipua Mapunatea hearing than in many others, because of the detail in which the case was argued, but the tendency to discuss matters in terms of hapū rights remained. The various claimants often did acknowledge that the others had some rights over small areas of the block in question derived from a different ancestor, or that ancestral rights to a certain area were mixed, but they had to downplay this in order to protect their own claim before the Court.

Derivation of fishing rights from other than *take tupuna*

The fishing rights of the earliest Ngāti Kahungunu inhabitants of the swampy fringe area around Wairarapa Moana were based on the derivation of the land from Te Rerewa and Te Rangitāwhanga's exchange of the land for the canoes,[15] but in time *take tupuna* was supplemented by other sorts of *take* which were claimed as a source of fishing rights. Fishing rights, fishing devices such as *pā tuna*, or the lands and waters comprising a fishing area could be gifted by those who controlled the land or resource; or an individual could be invited onto the land to share in the resource. Hēmi Te Miha attempted to bolster his ancestral claim to the Tipua Mapunatea Block (which was supported by few others) by stating that:

> Those who were excluded (Piripi Pataromu and others) were not entitled through occupation although descended from a common Ancestor.
> The case is different in respect of the claim to Te Tipua because I was constantly invited to go there by Hiko.[16]

Another important part of Hēmi Te Miha's claim to rights as one of Te Hiha's successors was that Te Hiha had made a "gift" of a small part of the block at Te Tipua to Pohatu, in return for Pohatu having sheltered him. Te Pohatu's descendants then continued to have a right in a *pā tuna* on the land. Hēmi's claim was based on Te Hiha having sufficient mana to make such a grant.[17]

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[15] See pages 190-192 *supra*.

[16] TMH, 2/10/1888, MB 9 p.189

[17] Hemi Te Miha, TMH, 2/10/1888, MB 9 p.193; Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 pp.232-233; Apiata Hakiaha, TMH, 29/10/1888, MB 9 pp.501,512; Wi Hutana, TMH, 15/11/1888, MB 10 p.86

Other grants of land and fishing rights were recorded as being made following the return from Nukutaurua, but these may not necessarily have followed customary patterns because of the disruptions engendered by this migration, and because of the number of previous residents who had died or moved elsewhere. Hōhepa Aporo maintained that before his death his kinsman Hohaia of Ngāti Rakairangi "gave all the lands on the Ruamahanga to Ani Hiko", to whom he was also related, even though Hohaia and Hōhepa were the only two remaining from Ngāti Rakairangi with a claim to the area.[18] Te Wheteriki also disposed of some of his assets to others. He gave the *pā tuna* at Karewahine and some land at Te Iringa to Hēmi Te Miha's wife Te Ruihi, with the "gift" at Karewahine being explicitly confined to the *pā tuna* only.[19]

Gifts of resources could also be made as *utu*, to recompense another party for damages done and to prevent further attacks being made. Such was the case, according to members of Ngāti Rakairangi, when a group of Ngāti Pokenga went to catch eels at a spot belonging to a Ngāti Rakairangi whānau at Kare Māipi, and replaced the *hīnaki* of this whānau with their own. When they returned the following morning to fetch their *hīnaki*, they found Ngāti Rakairangi under Tono lying in wait. Tono seized the Ngāti Pokenga leader Marokiekie and one other, gave them a thorough dunking in a nearby water hole, then gave them permission to fish at that site.[20] Tono probably allowed them to continue to fish at this one spot to avoid Ngāti Pokenga seeking violent retribution for their embarrassment, while making it clear by his own response, and the subsequent granting of permission to use the fishery, that he considered the area absolutely under the control of his hapū. However, this whole account was disputed by the other claimants, who rejected Ngāti Rakairangi's claims to the land, and believed that it was chronologically and genealogically impossible for the individuals named in the account to have been involved together. Paratene Mātenga (one of Ani Hiko's claimants for the Tipua Mapunatea Block) did however state that he saw Taurua of Ngāti Pokenga eeling at Ngakoau, where Kare Māipi was situated, although he said that he had never seen Ngāti Rakairangi eeling there and that the area was under the mana of Te Hiko and Arihia Ngāwhawha.[21]

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[18] TMH, 25/10/1888, MB 9 pp.467-468

[19] Wi Hutana, TMH, 24/11/1888, MB 10 p.173

[20] Hohepa Aporo, TMH, 23/10/1888, MB 9 p.439, 16/4/1890, MB 13 pp.314-315; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.17

[21] Paratene Matenga, TMH, 28/11/1888, MB 10 p.214; Judgment, TMH, 16/4/1890, MB 13 pp.326-327

A similar incident occurred when Hautu Te Rangi (a grandson of Te Hiha and grandfather of Te Hiko) died, and Te Pohehe, a chief of the Ngāti Uhu and Ngāi Tuawhio hapū of Ngāti Kahukuraāwhitia, was accused of "bewitching" and killing him. Te Pohehe did not have to leave the land, but he had to surrender his right to fish at his half of the important *wakarau tuna* called Te Akau o Roitu. Hautu Te Rangi's hapū Ngāti Te Hiha and Ngāti Rakairangi took over Te Pohehe's right to Te Akau o Roitu, although Te Pohehe's daughter was able to continue to eel there in her own right.[22] By surrendering his personal right to a valuable resource, Te Pohehe protected his family and hapū from retributive attacks and may have ensured his daughter's right to continue using the resource.

Another situation where fishing rights could be transferred was as compensation for adultery. Such an incident was central to the Patakakurawhiti succession case, where both the original grantees Wī Tutere and Ihaka Ngahiwi had died, leaving their successors to disagree over the extent of each party's share of the block. Wī Tutere's party believed that the land in the area (which was rich in eeling spots and *pā tuna*) had been taken by their *tupuna* Tohenga because his wife Hinekiri had "committed adultery" with Ihaka's *tupuna* Kiriharea. They sought to punish Kiriharea's hapū by taking the land, but, for some unexplained reason, they decided not to kill him.[23] A passing allusion was made to similar circumstances in the Tipua Mapunatea case, where Eruera Rangitakaiwaho tried to de-emphasize the Ngāti Te Hiha claim by stating that he had "[h]eard that a wahine was the 'take' that caused land to be taken from the tipuna's of Tamaihikoia."[24] As the land on this block was almost wholly uninhabitable because it was so wet and riddled with waterways, any land taken would have largely comprised fishing areas.

Fishing rights could also be acquired by taking them by force from those who had previously owned or exercised them. In cases where the control over large areas of land changed hands, as in the days of Rakaumoana or Rangituinomotu,[25] control of the fishing areas on those lands would also pass to the new chiefs. Acquisitions were also made on a smaller scale, and

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[22] Eruera Turei [Rangitakaiwaho], TMH, 28/2/1890, MB 13 pp.105,137,141-142; Ahitana Matenga, TMH, 7/3/1890, MB 13 p.159

[23] Manihera Maaka, 15/8/1888, MB 8 pp.319,321; Whatahoro, ibid. p.324; Ngatuere, ibid. pp.334-335

[24] TMH, 9/10/1888, MB 9 p.290

[25] See page 193 *supra*.

more directly targeted at fisheries. Marokiekie and his party had been attempting to appropriate the use of Ngāti Rakairangi's eel weir when they were caught by Tono. Another incident related in detail, where force was used to revive an old right rather than acquire a completely new one, was that of Te Watarauhi, who obtained *pā tuna* at Te Hemingi and at Te Awa o Te Kuri by force in about 1825. He acquired Te Hemingi from Te Mātenga, his father Poiki, and Te Rutene (all of them of Ngāti Ruatapu) in the following circumstances, as related by Paraone Pahoro of Ngāti Moe:

> Te Watarauhi and Te Heketia were living on the land and heard the people to whom the pa tuna belonged talking loudly in praise about the size and number of the eels caught there. He was vexed at this and went and took the pa tuna belonging to these people.[26]

It seems that Te Watarauhi had some family connections to the *pā tuna* and the land around it, as the use of the *pā tuna* had been granted to Te Mātenga and his associates by Pita Te Hinake, Te Watarauhi's younger cousin. Paratene Mātenga, son of Te Mātenga, believed that Te Watarauhi's branch of the family had lost their rights in the area because of their prolonged absence from the land over several generations, but that by returning and taking over the *pā tuna*, Te Watarauhi recovered his rights.[27]

Paraone Pahoro had based his claim to part of the area wholly on his descent from Te Watarauhi and the inheritance of the *pā tuna* by Te Watarauhi's son Paiura, who "had no 'take' generally to the land [—] his right was confined to a pa tuna at Te Hemingi",[28] so he was understandably keen to promote Te Watarauhi's *take tupuna* given the Court's preference for such claims. Despite this necessity to prove an unbroken *take tupuna*, Paraone's evidence constantly referred also to the act of taking the *pā tuna*: "I have two 'takes' to the land an ancestral one and one through the taking of Te Watarauhi of the parts already described."[29] This suggests that in customary terms, it was the taking of the *pā tuna* by force that reinforced and resurrected the lapsed *take tupuna*. The effects of the Land Court process can also be seen in Paraone's evidence, where he sometimes seemed unsure about which *take* he should stress in order to impress the judge. To emphasize the *take tupuna* had its dangers due to the absence of

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[26] TMH, 27/3/1890, MB 13 p.256

[27] TMH, 3/12/1888, MB 10 p.250

[28] TMH, 14/3/1890, MB 13 p.232

[29] TMH, 27/3/1890, MB 13 p.257

Te Watarauhi's immediate ancestors from the area, while to stress the act of force carried the risk of being overridden by the *take tupuna* of other claimants.[30]

Fishing rights were not always made over or shared as a result of some violent act. Land or a fishing resource could be made over to a woman on her marriage, especially if she married someone from outside the hapū, to ensure a means of support for herself and her children. In many cases women (and sometimes men) and their families also continued to return in season to fish at their whānau or hapū resource after they had married and moved away.[31] For example, Paratene Mātenga told the Court that:

> The term Ahi Karoa would extend to the brother of owners although the latter did not reside on the land.
> This would also apply to earlier generations as well as for instance the brother of Tui would have a 'take' through ahi karoa of the latter.[32]

Eruera Rangitakaiwaho gave another example: "Puangatahi did not remain on the land he married a woman of Ngatimoe and went elsewhere. Used to go [back] to Waitahiti to eel occasionally."[33]

These rights, if maintained through use, could be passed down in turn to the children of those who had left. Thus children living in one area and identifying primarily with one hapū could have fishing rights in other areas through the various hapū of their other parent and immediate ancestors.[34] In this way, many individuals came to have rights scattered over a large area, all derived from different ancestors of different hapū; but the number of these rights available was limited by the ability of each individual to use a resource frequently enough to maintain the right. Those descended from well-born ancestors, who were more likely to have married outside the hapū, had particularly good access to a wide range of resource rights. Much of the land which was given to those who came to the Wairarapa with Te Rangitāwhanga, beyond

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[30] Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.233; Wi Hutana, TMH, 14/3/1890, MB 13 pp.231-232; Paraone Pahoro, TMH, 27/3/1890, MB 13 pp.255-258,261-262; Ramari Eramiha, TMH, 28/3/1890, pp.269, 273-276

[31] Eruera Rangitakaiwaho, TMH, 6/10/1888, MB 9 p.264, 28/2/1890, MB 13 p.105; Hariata Mikaera, TMH, 26/3/1890, MB 13 p.250; Ani Hiko, Matiti, 16/4/1890, MB 13 p.334

[32] TMH, 3/12/1888, MB 10 pp.249-250

[33] TMH, 1/3/1890, MB 13 p.111

[34] See pages 13,17-19 *supra*.

the original area granted by Te Rerewa, was in the form of marriage gifts from Rangitāne to the newcomers as their descendants intermarried.[35] However, it was not automatic that all women, even when of high rank, received such gifts or dowries on marriage (Te Mānihera described the practice as "Aromea", translated by the Court as "dowry").[36] Hēmi Te Miha's case for the Tipua Mapunatea Block broke down on the fact that his *tupuna* Hinetārewa was not granted any land by her father Te Werenga or her brothers when she married Ngārangitopetopea and went to live with him. As she did not return to her father's land to exercise the rights she had before her marriage, and as her immediate descendants did not return to revive their *take* within the next few generations, their rights to the land and its resources were deemed to have been lost.[37] Three or four generations was considered by many in the Court to be the maximum time a resource could be left unworked by a particular family line before the right was extinguished, although later descendants could be invited back at any time by the remaining occupants.[38]

One particular transfer of land which had considerable implications for fishing rights was that said to have been made to Te Kowhai when she married Te Hiha's youngest son Te Rakato. According to Hōhepa Aporo, her hapū Ngāti Rakairangi (or more specifically her mother Te Unuatahi and her brothers) then gave her land including the Ngakoau and Ngāmā-hanga lagoons on the Tipua Mapunatea Block, and part of the Matiti Block. Hōhepa Aporo then stated that, "When Kohai was pregnant her mother said that the part included in the gift should be given to Kohai to provide food for the child when it was born. Mitai Poneke was the name of the child."[39] Hōhepa's brother Piripi Te Maari (who, along with Hōhepa, had been fostered by Mitai Poneke) also told the Court that this gift had been made, and that the land had passed to Mitai Poneke on his birth. This was how Ngāti Rakairangi considered the descendants of Te Hiha to

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[35] Te Meihana Hapeta, Hurunuiorangi, 29/3/1869, MB 1H pp.109-110; Angela Heather Ballara The Origins of Ngāti Kahungunu unpublished PhD thesis, Victoria University of Wellington, 1991, p.87

[36] Maramamau, 13/8/1867, MB 1 p.149

[37] Hemi Te Miha, TMH, 2/10/1888, pp.200-201; Claimants' Statement of Case, TMH, 16/4/1890, p.316; Judgment, TMH, 16/4/1890, p.323

[38] See for example Paratene Matenga, TMH, 3/12/1888, MB 10 p.250; Ramari Eramiha, TMH, 28/3/1890, MB 13 p.272; Wi Hutana, TMH, 16/4/1890, MB 13 p.316; Judgment, TMH, 16/4/1890, p.323; Judgment (Judge Mackay), Matiti, 16/4/1890, MB 13 p.335. It is unclear whether this strict 'three generation rule' was a product of the Court's emphasis on *take tupuna*, or a genuine aspect of customary land tenure; although it clearly has its roots in Māori custom. See pages 79-80 *supra*.

[39] TMH, 24/10/1888, MB 9 pp.456-457; see also TMH, 16/4/1890, MB 13 p.315

have a right on this part of the Tipua Mapunatea Block, through *take tupuna* from Te Kowhai and Te Rakato, or by *take whanaunga* from Te Rakato's marriage to Te Kowhai. They also had a right to occupy the other parts of the block by descent from Te Hiha.[40]

Thus, while Hōhepa Aporo agreed with Ani Hiko that her whānau had a right to the whole block, he disagreed with the *take* given by Ani Hiko. Ani Hiko's party disputed the claims made by Ngāti Rakairangi, maintaining that it was Te Kowhai and her brothers who had obtained a right to the land through her marriage to Te Rakato, and not vice versa.[41] Whatever the merits of these respective claims, it is clear that even if the land was not given to Te Kowhai as a dowry, one party acquired a right to fish on the land through the marriage of one of their own into the hapū that controlled these rights.

Such rights derived from intermarriage between hapū were common. Most Land Court cases contained at least a passing reference to rights (be they a residence right, a right to use a resource, or both) obtained through one's in-laws, and such rights were readily recognized by a number of witnesses as being a customary part of land tenure and resource allotment.[42] When Te Uriroroa married Te Kai of Ngāi Tahutāwhanga, people from her own hapū accompanied her husband's to the seasonal eel fishery at the *pā tuna* Te Wakaumu and the *wakarau* Te Akau o Roitu.[43] Often these examples of *take whanaunga* were recounted to try to disprove the claims made by a rival group from a particular ancestor. The ownership of the Te Uru o Kakite Block, situated along the Ruamāhanga just to the north of the lake, was claimed by the descendants of Haerewa, but this was disputed by the counter-claimant Te Tutu te Tauwamatu because "[i]t was Tuingara being a wife to Haerewa that brought him and his teina [younger brother(s) or cousin(s)] to this land."[44] In the Otaupuaroaro case, Ngāti Te Hiha disagreed that Porou, who had exercised wide-ranging fishing rights on the block, had any rights through *take tupuna*, and

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[40] Piripi Te Maari, TMH, 3/11/1888, MB 10 pp.15-17

[41] Wi Hutana, TMH, 16/4/1890, MB 13 p.318; Ani Hiko, 16/4/1890, MB 13 pp.333-334; Judgment, TMH, 16/4/1890, MB 13 pp.326-327

[42] Kahu o te Rangi, TMH, 3/10/1888, p.217; Hohepa Aporo, TMH, 26/10/1888, p.477; Paratene Matenga, TMH, 3/12/1888, MB 10 p.252; Eruera Rangitakaiwaho, TMH, 28/2/1890, MB 13 pp.104-105; Ahitana Matenga, TMH, 8/3/1890, MB 13 p.175; Wi Hutana, TMH, 16/4/1890, MB 13 pp.318,322; Ani Hiko, Matiti, 16/4/1890, p.333

[43] Eruera Rangitakaiwaho, TMH, 28/2/1890, MB 13 pp.105,110

[44] Te Uru o Kakite, 20/10/1868, MB 1A p.76

stated that his only right to the land was through marrying the sister of the 'rightful owner'. This contention was disputed by the other party, and ultimately rejected by the judge.[45]

The use of a fishing resource by those asserting *take whanaunga* (even if it were not expressed by that term)[46] rather than *take tupuna* carried certain conditions. It does not seem to have been an automatic right, and where granted, could be revoked. Whether a right by inter-marriage was secured or not would most probably depend upon a number of factors such as the distance between the two groups, the relative wealth of each, and the bounty of the resource.[47] The prevalence of such rights in the Wairarapa district may well be a reflection of the abundance of the fisheries in the area; it may also reflect the amount of complex and detailed evidence given in the Tipua Mapunatea case. While the incoming group might work a resource alongside those to whom it belonged, they did not acquire a permanent or proprietary right to the resource — that is, they worked it on sufferance. Eruera Rangitakaiwaho told how "Tarapurupuru is another place that my tipuna's worked at without any 'take'.... They worked there through relationship but had no right to the place."[48] These *take whanaunga* rights frequently became *take tupuna* rights over generations, as the descendants of the original marriage kept up the rights, and subsequent intermarriages took place. The practice of living on land belonging to the spouse of a family member was extremely common after the return from Nukutaurua, as traditional patterns of occupation and resource use had been broken by the absence and other societal changes such as the introduction of Western foods. Many people also found themselves the only survivor of a previously large group that had occupied a particular area.[49]

The rights obtained by intermarriage and the corresponding return obligations could be wide-ranging, as is illustrated by the following explanation, given by Hōhepa Aporo, of how Karokaro o Tamahau received its name.

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[45] Ngati Kahukuraawhitia Claim, TMH, 9/4/1890, MB 13 pp.288-289; Judgment, TMH, 9/4/1890, MB 13 p.292; Wi Hutana, TMH, 16/4/1890, MB 13 pp.316-317

[46] See page 207 note 91 *supra* for the term *take whanaunga*.

[47] Examples of *take whanaunga* were given by Kahu o te Rangi, TMH, 3/10/1888, MB 9 p.217; Eruera Rangi-takaiwaho, TMH, 5/10/1888, MB 9 p.256; Hohepa Aporo, TMH, 24/10/1888, MB 9 p.454; Wi Hutana, TMH, 13/11/1888, MB 10 p.64; Paratene Matenga, TMH, 3/12/1888, MB 13 p.252; Judgment, Matiti, 16/4/1890, MB 13 p.336

[48] TMH, 9/10/1888, MB 9 p.301

[49] Hohepa Aporo, TMH, 23/10/1888, MB 9 p.447; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.507; Hariata Mikaera, TMH, 26/3/1890, MB 13 p.250

> Karokaro o Tamahau is close by it is a wakarau the hapus who obtain eels from there are Rakairangi and Hinetauira. Te Aukomiro was the former name of that place.
> It was afterwards called te Karokaro o Tamahau through a hinake of that name.
> The cause was the marriage of Te Ngahoro with Hinetakutai of Rakairangi. Te Ngahoro was of Ngati-kahukuranui....
> Ngahoro afterwards returned to Maungaraki taking with him the eels caught by his party as well as others given. Some of these eels were given to Tamahau he was [h]e tangata nui [an important man] of that hapu.
> Tamahau gave one of his hinakes (called after his karokaro [slave?]) to Ngahoro as well as other presents. And it was through this hinake being used afterwards to catch eels at Te Aukomiro and this gave rise to the name the place is now known by.[50]

Clearly Ngahoro was allowed to share in the fisheries of his wife's hapū, but as he returned at some time to Maungaraki, taking with him eels from his wife's hapū, his rights and his role within his wife's community would have been limited. However, his personal right to fish there through his wife was reinforced by his action in taking eels from that *wakarau tuna* to use as a gift to his original hapū. Ngahoro's association with the fishery was increased even further by the use of a *hīnaki* named after his chief Tamahau, and the transfer of this name to the fishery, rather than a name associated with his wife's hapū, which preserved his involvement in the fishery in the oral record.[51]

The acquisition of residential or fishing rights through intermarriage was only one example of rights obtained through 'horizontal' rather than 'vertical' family ties. It was also common for people to share in the resources of their half-siblings or cousins even where these were derived from a different parent or set of grandparents. Hōhepa Te Wakiumu told the Native Land Court that "[i]t is a Maori custom that the teina lived on the land of the tuakana and the tuakana on the land of the teina."[52] Wide networks of resources were thereby developed amongst whānau and small hapū groupings, and if such practices were continued over even two or three generations, it is easy to see how disputes began over who was the ancestor from whom the right to the resource was derived.[53] This is especially true of many of the rights going back to the

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[50] TMH, 24/10/1888, MB 9 p.454

[51] See pages 37,57-58,69 *supra*.

[52] Hohepa Te Wakiumu, TMH, 16/10/1888, MB 9 pp.380,389; Hohepa Aporo, TMH, 23/10/1888, MB 9 pp.439-440, 26/10/1888, p.482; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.518; Eruera Rangitakaiwaho, TMH, 3/3/1890, MB 13 p.122; Wi Hutana, TMH, 16/4/1890, p.316

[53] See for example Judge Mackay, Otaupuaroaro, 9/4/1890, MB 13 p.291

arrival of Ngāti Kahungunu in the area, as while one party might claim that they derived their land by descent from a particular ancestor who had a relationship to Te Rangitāwhanga on the Ngāti Kahungunu side; a rival party might claim that the land had only been occupied through this relationship with Te Rangitāwhanga, who derived his right to the land from his Rangitāne ancestors.[54]

Hapū, whānau and personal fishing rights

The land-focussed nature of Native Land Court proceedings, coupled with an increasing unwillingness from the Court to investigate fishing rights, dictated the forms of Māori evidence given to the Court, and therefore dictated that fishing rights were dealt with only as an adjunct to questions of land ownership. They only occupied an important place in the evidence given where the land contained an appreciable number of fishing resources or bordered onto a major resource such as a productive lake or river. The Court also generally determined ownership of fairly large pieces of land, claimed by large groups of individuals with common interests. This meant that the group usually involved in land claims was the hapū, or sometimes small groups of closely related hapū. Hence when fishing rights were discussed by those giving evidence, it was often in terms of hapū ownership and use rights, regardless of whether this was an appropriate way to discuss the fishing rights at stake. The Tipua Mapunatea case provides something of an exception to this general rule. While the Court did not intentionally focus on whānau or personal fishing rights, as opposed to hapū rights, the block was subject to such complex and closely-argued claims and counter-claims that the evidence given was of sufficient depth and detail to provide some indication of what determined the scale of a fishing right.

When considered apart from general claims made over areas of land and water, the exercise of a fishing right by a hapū or group of hapū was usually confined to reasonably extensive areas, such as a large lagoon or a stretch of river, where there was either a resource productive enough to be used by a number of people, or with the potential to be subdivided into a number of smaller resource rights to be exercised by subdivisions within the tribe. Labour-

[54] Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.523; Eruera Rangitakaiwaho, TMH, 16/4/1890, MB 13 p.312; Wi Hutana, TMH, 16/4/1890, MB 13 p.316

intensive resources such as big *pā tuna* were also often attributed to hapū. *Pā tuna* in small creeks or shallow lagoons, which were only used when the floodwaters provided an increased water flow, probably consisted of little more than wattled stakes driven into the mud; but those in larger streams and rivers and in deep lagoons, which needed to be of much more solid and permanent construction, required the labour of a wider group to build and maintain them, and so were more likely to be owned and used by the larger group.

Lagoons in particular could be claimed by a number of hapū. The Te Hopai Lagoon was probably the most extensive on the lake fringes. While there was some mention by Hēmi Te Miha's party that Ngāti Rakairangi fished there,[55] it was elsewhere claimed by various constituent hapū of Rākaiwhakairi, often represented by Ngāti Te Hiha and Te Hiko. The smaller hapū associated with Ngāti Te Hiha at Te Hopai were Ngāti Kotorewai [spelling uncertain], Ngāti Hinetoko, Ngāti Whaitongarerewa, Ngāti Te Rangituanui, Ngāi Tahutāwhanga, and Ngāti Pokenga.[56] Even taking into account that there would have been considerable overlap amongst these hapū, and that many of the smaller hapū would have amounted to little more than large extended families, it is likely that a large body of people was involved in fishing the Te Hopai Lagoon.

The Ngakoau lagoon was fished by a similarly large group of hapū. The claims for this lagoon were more evenly divided between the Ngāti Rakairangi and Ngāti Te Hiha rival groups. Ngāti Rakairangi did not name any associated hapū in their claim for the Ngakoau lagoon, but as they were a large hapū dating back many generations, its composite hapū may well have been absorbed into a unified claim based on descent from the ancestor Rakairangi. The Ngāti Te Hiha claim included the same minor hapū that accompanied their claim to the Te Hopai Lagoon.[57] The right to fish the Rangatea Lagoon, outside the Tipua Mapunatea block, was not disputed. Fishing rights there were exercised solely by Ngāti Rakairangi and Ngāti Hinetauira, two closely related hapū.[58] However, the emphasis placed by the Ngāti Te Hiha claimants on Ngāti Rakairangi and

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55 Kahu o te Rangi, TMH, 3/10/1888, MB 9 pp.214-215

56 Wi Hutana, TMH, 13/11/1888, MB 10 p.64, 24/11/1888, p.175, 12/3/1890, MB 13 p.208; Paratene Matenga, TMH, 28/11/1888, MB 10 p.208, 3/12/1888, p.247

57 Hohepa Aporo, TMH, 23/10/1888, MB 9 pp.438,455-456, 16/4/1890, MB 13 p.315; Piripi Te Maari, TMH, 3/11/1888, MB 10 p.17; Paratene Matenga, TMH, 28/11/1888, MB 10 p.208; Wi Hutana, TMH, 12/3/1890, MB 13 p.208; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 p.318

58 Wi Hutana, TMH, 16/11/1888, MB 10 p.95, 19/11/1888, p.122, 21/11/1888, p.142; Paratene Matenga, TMH, 28/11/1888, MB 10 p.214

Ngāti Hinetauira rights to the Rangatea lagoon and other fishing spots nearby may reflect a hidden agenda. If they could prove that Ngāti Rakairangi had considerable fishing interests outside the block being considered by the Court, their own chances of being awarded the block would be enhanced.

Streams, like lagoons, tended to be claimed by hapū groups, although they were often divided along their length into a number of smaller, more independent sites. The Houhoupounamu stream was fished by Ngāti Te Apohanga, which had a number of *pā tuna* there. Other claims were also made by Te Hiha's hapū Ngāti Hakeke, Ngāti Kotuku and Ngāti Hikarara (an offshoot of Ngāti Hakeke), and their associated hapū Ngāti Te Rangituanui also had a *pā tuna* along the stream. Smaller, less significant streams with maybe only one *pā tuna*, such as Te Awa o Kotuku, were usually claimed by only one small hapū, in this case Ngāti Kotuku.[59] Most of these small hapū exercising a sole right over a small stream or the like may have been exercising something more akin to a whānau right to a resource, rather than a hapū right. Indeed, there is no clear boundary line between the rights of these small hapū and the rights of large whānau, with the usage rights of smaller groups often being seen within the context of the overright of the larger hapū.

Wakarau tuna were another natural fishing resource which were often claimed by larger groups, and they were also the subject of contention between them. It was possible for ownership of *wakarau* to be shared amongst two or more disparate groups because they usually had several mouths draining in different directions. One such was Te Karokaro o Tamahau, which had seven mouths. Hōhepa Aporo claimed the whole as the property of Ngāti Rakairangi and Ngāti Hinetauira.[60] Wī Hutana also laid claim to the whole *wakarau* on behalf of the related hapū Ngāti Hinetoko, Ngāti Pokenga and Ngāti Whaitongarerewa.[61] Each party denied the right of the other to fish there. Other *wakarau* were more clearly under the influence of a single group. For example, Te Akau o Roitu was claimed generally by the descendants of Tutemiha, under the hapū names of Ngāti Te Hiha, Ngāti Whaitongarerewa, Ngāti Te Rangituanui, Ngāi Tahutāwhanga, Ngāti Pokenga, and Ngāti Kotorewai. Other groups did also claim a right to use some mouths of

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[59] Eruera Turei Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.237, 1/3/1890, MB 13 p.109; Wi Hutana, TMH, 15/11/1888, MB 10 p.86, 13/3/1890, MB 13 pp.218-219

[60] TMH, 23/10/1888, MB 9 pp.437,454

[61] TMH, 15/11/1888, MB 10 p.88, 22/11/1888, p.150, 12/3/1890, MB 13 p.211

this *wakarau*, but acknowledged the right of those under the mana of Tamaihikoia and his successors to use at least half the mouths.[62]

There are a few examples of rights to *pā tuna* being claimed by one or more hapū. According to Wī Hutana and Paratene Mātenga, the Pakoko *pā tuna* belonged to Ngāti Rakai-rangi.[63] The *pā tuna* Te Ikaarua was claimed on behalf of the whole Ngāti Kahukuraāwhitia hapū, and was also claimed by Ngāti Te Hiha and no less than nine other associated minor hapū of Rākaiwhakairi. Te Kakato was another *pā tuna* claimed by the same ten hapū under the umbrella of Ngāti Te Hiha.[64] These last two resources must either have produced a vast haul of eels in their season, or have been fished by only a few people on behalf of those hapū said to have rights to the weir. As with small streams and lagoons, individual *pā tuna* in the Wairarapa district claimed exclusively by one small hapū were likely to have been fished under something more analogous to a broad whānau right, which was nevertheless defined by a hapū appellation. For example, the right to fish at the Piupiu *pā tuna* was attributed to Ngāti Ruapatohi by Eruera Rangitakaiwaho, who however did not name anyone apart from himself who had a right to fish there.[65] This does not necessarily mean that Eruera was the only person with a right to fish there, as people in the Court were often reluctant to talk about any rights other than their own; but claimants would usually at least name all of their relatives who had a right to any particular area, to maximise the extent of their claim to rights.

There is very little explicit description in the Native Land Court records of how whānau fishing rights were held and exercised. As already mentioned, many rights exercised and claimed by small hapū may have in effect constituted whānau rights, given the small numbers of people in these hapū of only a few generations' standing. In the absence of comprehensive whakapapa submitted to the Court, it can be impossible to tell whether members of small hapū were close or distant relatives. Ngāti Te Hiha have already been mentioned as claimants in several areas, but

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[62] Eruera Turei Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.235, 28/2/1890, MB 13 p.105, 5/3/1890, pp.141-142; Wi Hutana, TMH, 12/3/1890, MB 13 p.208

[63] Wi Hutana, TMH, 21/11/1888, MB 10 p.138; Paratene Matenga, TMH, 28/11/1888, MB 10 p.214; but see also page 266 *infra*.

[64] Wi Hutana, TMH, 15/11/1888, MB 10 p.87, 13/3/1890, MB 13 pp.218-219; Te Whatahoro, TMH, 28/2/1890, MB 13 p.102

[65] TMH, 4/10/1888, MB 9 p.235

as a hapū they only encompassed four or five generations at the most, the name referring to the descendants of Te Hiha's son Te Werenga. Other hapū names such as Ngāti Hinetoko are of similar vintage.[66] It may well be that to attempt to make a firm division between small hapū and whānau rights is to impose an artificial divide based on typically over-structured Pākehā notions of social stratification. There was no clear line between a large whānau and a small hapū, and there is a correspondingly blurred distinction between the ways in which these two groups exercised fishing rights.[67] It should still be possible, however, to distinguish fishing rights exercised by a group spanning just three or four generations from rights exercised by a much broader descent group.

The exercise of many fishing rights was also described as being undertaken by named individuals, but these fishing rights were more likely to have been personal in nature than strictly individual — the distinction being that a personal right also applied to a person's immediate family, that is, his or her dependents and household, although they were in the name of the family head. If a particular whānau had a large number of widely scattered resources, certain individuals may have worked particular areas on behalf of the whole whānau, and then shared out the fruits. Where the resource was reasonably abundant, the right to fish would also often pass to all of an individual's children rather than to just one of them. The attrition of the Māori population from the late eighteenth century onwards, and the disruptions brought about by the Nukutaurua *heke*, may have served to reduce what had been whānau or even hapū rights to personal rights by the time the Native Land Court came to Wairarapa in the 1860s.[68]

It is possible to identify some examples of whānau rights being exercised without resorting to surmise. During the early stages of the Ngāti Kahungunu settlement of the Wairarapa district, almost all fishing rights exercised by the newcomers would have been at whānau level, given the small scale of the migration and the interrelationships between its members. The family nature of these initial rights, and the importance of the relationship to Te Rangitāwhanga, was stressed by many of the claimants.[69] Subsequent divisions of the land amongst the second and third generations of Ngāti Kahungunu settlers also subdivided fishing rights, which were then

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[66] Hohepa Aporo, TMH, 25/10/1888, MB 9 p.469

[67] Ballara, p.359; see pages 17-18 *supra*.

[68] Ballara, p.363

[69] *e.g.* Apiata Hakiaha, TMH, 29/10/1888, MB 9 pp.522-523

presumably exercised at a whānau level by these new groups. For example, Rangitāwhanga's five sons received four different blocks around the lake from their father, one block being shared by two sons.[70] Likewise, Rakairangi's family occupied his land along with him in the early stages of their settlement, but over the next few generations it was divided into smaller parcels of land and resources used by the immediate families of his various descendants.[71]

Even as the initial families expanded into hapū, fishing rights continued to be exercised at a whānau level. Many of the large fishing resources used by hapū contained numerous smaller sites, such as creeks and seasonal *pā tuna*, which could be shared out amongst the whānau of the hapū. Kare Māipi, a stream containing some *pā tuna*, was an example of this. It was an artificial waterway in the vicinity of the Ngakoau lagoon, having been dug by Te Popoki's children for eel-catching purposes. The eel fishery at Kare Māipi was associated particularly with Tono, one of Te Popoki's sons, but all of the whānau seem to have been involved.[72] Piripi Te Maari told the Court that, "[p]art of Ngakoau belonged to Rakairangi to nga whanau o te Popoki. They used to eel at Kare Maipi", and it was these whānau members under Tono who attacked Marokiekie and his party for attempting to eel at Kare Māipi.[73]

Another reasonably distant group of ancestors who had a whānau right to fish at a particular resource were Huhuru and his several sisters, who lived in the days of Te Apohanga and had rights at a number of *pā tuna* and *wakarau*. They had *pā tuna* in five different locations including the Houhoupounamu stream and at Ngāwakatara. These siblings were a branch of Ngāi Tahutāwhanga and were also connected with the group that was to become known by the name of Te Apohanga. It was Ngāti Te Apohanga who later claimed the pā tuna at Ngāwaka-tara, which may indicate that a right passed to all the descendants of Huhuru and his family, becoming a hapū right over time.[74] Likewise, the right to fish at the Te Wakaumu *pā tuna* was exercised in the past by Kahutara's daughter Kairere and her children, but the fishing right consequently passed down to all their descendants, and came to be identified with Ngāti Uhu rather than any particular whānau (although there was only one person belonging to Ngāti Uhu

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[70] Piripi Te Maari, TMH, 2/11/1888, MB 10 p.8

[71] Hohepa Aporo, TMH, 16/4/1890, MB 13 pp.314-315

[72] Hohepa Aporo, TMH, 26/10/1888, MB 9 p.475, 16/4/1890, MB 13 pp.314-315

[73] Piripi Te Maari, TMH, 3/11/1888, MB 10 p.17; see page 233 *supra*.

[74] Eruera Turei Rangitakaiwaho, TMH, 4/10/1888, MB 9 pp.236-237, 1/3/1890, MB 13 p.109

named in the Court in 1890). Ngāi Tahutāwhanga also came to have a right there through *take whanaunga*.[75]

Numerous contemporary whānau rights on and around the Tipua Mapunatea block were described to the Court when it heard that case, although they were hardly ever defined as such. Hōhepa Te Wakiumu told how he, his half-brother Te Hiko, and their *tuākana* cousins Te Kēpa and Kereopa went eeling at Mapunatea (a particular place on the block bearing the same name). They had a right through *take tupuna* there from Karewhare, a distant ancestor, but as no other descendants of that *tupuna* claimed a right to eel at Mapunatea, it would seem that the fishing rights there passed to a more restricted group of Karewhare's descendants, who all had a much more recent ancestor in common.[76] This is not necessarily inconsistent with other evidence giving Mapunatea as an eeling spot of Ngāi [Whai]tongarerewa and Ngāti Hinetoko, as these were both small hapū associated with Te Hiko, and may have been represented by only the individuals named above and their immediate families.[77]

Te Pakihautahi o Porou was a ditch which had a small mānuka wattled *pā tuna* in it. This *pā tuna* had been made by Ahitana Mātenga and was worked by him and his brother Paratene; and Ahitana also said that their close relatives, the brothers Rutene and Rihari, had a right there.[78] The name of the site suggests that the right to use the ditch had passed down to them from their ancestor Porou's use of the ditch as a fishing area. Other eeling spots were also worked by groups of cousins or other near relatives. The stream Te Awa o Pokai, which ran from the Te Hopai lagoon into the Houhoupounamu stream at times of high water, was fished by Rutene and Rihari, and their cousin Hone Te Wakahaurangi.[79] Such small seasonal resources, presumably with a limited annual yield, were likely to be passed down to a particular branch within a family and remain a whānau right because of the small scale of fishing operations there.

Regardless of the actual extent of whānau as compared to hapū fishing rights, the whānau played an important role in the transmission of skills and knowledge from one generation to the next. Not only parents and grandparents, but also elder siblings, cousins, and other

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[75] Eruera Turei Rangitakaiwaho, TMH, 1/3/1890, MB 13 p.110

[76] Hohepa Te Wakiumu, TMH, 11/10/1888, MB 9 p.344, 16/10/1888, pp.389,395

[77] Wi Hutana, TMH, 13/3/1890, MB 13 p.219; Hariata Mikaera, TMH, 26/3/1890, MB 13 p.249

[78] Te Watahoro, TMH, 28/2/1890, MB 13 p.102; Ahitana Matenga, TMH, 6/3/1890, MB 13 p.157

[79] Te Watahoro, TMH, 28/2/1890, MB 13 p.103; Eruera Turei [Rangitakaiwaho], TMH, 4/3/1890, MB 13 p.134

relatives taught the young where the fishing sites they were entitled to use were, and when and how to work them. This whānau teaching process applied both to rights exercised by the whānau alone, and to the rights which came through the wider hapū group. Hōhepa Aporo told the Court that he had got his knowledge of the land and its resources from "my tipunas, Matuas, and elder relatives", who had taken him onto the land and described its boundaries and features.[80] Others were instructed more particularly by only a few of their relatives. Paratene Mātenga owed his knowledge of the fishing resources he was entitled to use to his elder female cousin Te Owha-owha, who had taken him eeling to these places. Hōhepa Te Wakiumu was first introduced to the eeling resources of the Tipua Mapunatea block by his elder half-brother Te Hiko, and was taken by Te Hiko to all of his eeling spots.[81]

There are a number of difficulties to be faced in assessing the principles lying behind the rights of a person (or more specifically a family head) to use a particular fishing resource to the exclusion of others. This is especially the case where great reliance has to be placed on testimony given to the Native Land Court, as most of the key cases in the Wairarapa were heard late in the nineteenth century, after contact with Pākehā had altered customary resource usages such as fishing. Contact had also disrupted social patterns and caused a large drop in population, so that by the mid-nineteenth century it became difficult to distinguish between the exercise of a wider kin group fishing right by an individual survivor of that kin group, and the exercise of a right traditionally recognized as a personal right. It can also be difficult to determine whether rights attributed to individuals in the Court refer to personal ownership of the resource, a personal usage right, or a right of the individual to control a resource, especially given the focus of the Court on determining the relative rights of individuals rather than tribes on the land. Where personal rights were recognized in customary Māori tenure, they were almost always in the nature of a usage right, with the named individual and his or her household having a sole right to use the resource under the wider overright of the hapū.

A number of circumstances under which an individual could obtain a personal right to a fishing resource have already been discussed. These usually involved a change in possession, with the individual concerned taking over the use of the resource from some other group or

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[80] TMH, 24/10/1888, MB 9 p.453

[81] Paratene Matenga, TMH, 29/11/1888, MB 10 p.226; Hohepa Te Wakiumu, TMH, 16/10/1888, MB 9 p.389

individual. Examples of such personal rights include that of Muretū, who obtained fishing rights at Maramamau and Wairarapa Moana by gift from Te Hiha; Te Kowhai, who was given fishing areas as a bride gift, to be passed onto her eldest child; Te Watarauhi, who was said to have acquired a pā tuna by defeating those previously in possession of it; and Porou, who exercised a personal right of uncertain origin at a number of fisheries.[82] These cases illustrate that there were conditions that could and did lead to the exercise of a personal right to fish at a particular fishery.

In their discussion of the fishing rights of the Ngāti Kahungunu migrants, many people described the rights of these ancestors in terms analogous to both personal rights and immediate family rights, and so may simply have been discussing the same rights in slightly different ways. As the Native Land Court records provide little or no indication of Rangitāne fishing rights and practices at that time, it cannot be determined whether these Ngāti Kahungunu *tūpuna* did have sole rights over the large areas obtained from Te Rerewa, or whether they exercised a personal right *vis-à-vis* their Ngāti Kahungunu relatives alongside the pre-existing rights of Rangitāne. Eruera Rangitakaiwaho claimed that the whole Otaupuaroaro area had "belonged to" his *tupuna* Tutemiha, and Paratene Mātenga attributed the use of certain eel fisheries in that area to the descendants of that ancestor, who "derived their rights to these places from Tutemiha". Hōhepa Te Wakiumu traced Te Kēpa and Kereopa's right to fish at Mapunatea back to the occupation of the area by their *tupuna* Karewhare, saying that he was their "take" there.[83] Numerous fishing areas were also attributed to Te Rangitāwhanga, across the whole area which he was said to have held by gift from Te Rerewa.

Subsequent to this initial period of settlement, a clearer indication of the circumstances under which personal rights might apply begins to emerge. The fishing resources associated with individuals tended to be things such as *pā tuna* (which people were able to build and maintain by themselves or with the help of immediate family), or eel holes and small *wakarau* (which could be found or developed by an individual and family). These were usually worked within the wider boundaries of the fisheries of their specific kin group or tribe, and were often attributed to family heads or *mōrehu* (the survivors of dwindling groups).

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[82] See pages 217-218,235-238 *supra*, pages 262-263 *infra*.

[83] Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.235; Paratene Matenga, TMH, 28/11/1888, MB 10 p.210; Hohepa Te Wakiumu, TMH, 12/10/1888, MB 9 p.344

The role of the discoverer or developer was particularly important in the establishment of new personal rights.[84] The eel hole on the banks of the Ruamāhanga at Onetaua known as Te Urunga o Pahau was named after Pahau, the youngest son of Te Popoki, who had first discovered it and used it. This eel hole was only mentioned by Hōhepa Aporo and other Ngāti Rakairangi claimants who traced descent from Rakairangi and Te Popoki, and claimed the area including Te Urunga o Pahau from those *tūpuna*.[85]

A number of claimants from the different parties recounted how Te Pohehe had a right to as many as four of the mouths of the Te Akau o Roitu *wakarau*, a right which was later taken by another hapū in retribution for supposed wrongdoing. Te Pohehe also had fishing rights at the *pā tuna* Tataewahine o Whareatua, derived from the ancestor Whareatua who had presumably built a *pā tuna* there in the past. Both of these resources fell within the bounds of the area claimed by Ngāti Whaitongarerewa and their associated hapū, to which Te Pohehe belonged.[86] According to Paratene Mātenga, a number of fisheries were in the possession of Porou's son-in-law Terepuku. These included the *wakarau* where Kiore was killed by Porou and the *pā tuna* at Karetuwhenua. It was unclear how Terepuku's rights to these areas arose, or if he held them under the overright of any wider group, as it was said by Paratene Mātenga that, "It was not Porou's land where Kiore was killed. He startled Porou and that was the cause why he killed him".[87]

A similar pattern can be discerned from the accounts of personal rights in the nineteenth century. They are largely confined to *pā tuna*, although the use of some larger resources such as lagoons by certain individuals of high rank was also mentioned. The situation was described to the Court by Wī Hutana, who said that, "the chief had a right over the whole of the land but members of the hapus had only a right to such part as they cultivated or occupied."[88] The use of the *pā tuna* at Te Pakihautahi o Porou by Ahitana Mātenga and some of his close relatives, which

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[84] Ballara, pp.314,348-349

[85] Hohepa Aporo, TMH, 24/10/1888, MB 9 p.454, 26/10/1888, p.475, 16/4/1890, MB 13 p.315; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.501

[86] Eruera Turei [Rangitakaiwaho], TMH, 9/10/1888, MB 9 p.301, 28/2/1890, MB 13 p.105, 5/3/1890, pp.141-142; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.501; Wi Hutana, TMH, 15/11/1888, MB 10 pp.87-88, 22/11/1888, p.150, 12/3/1890, MB 13 pp.208,211; Ahitana Matenga, TMH, 7/3/1890, MB 13 p.159. See also page 234 *supra*.

[87] TMH, 1/12/1888, MB 10 p.242

[88] TMH, 27/11/1888, MB 10 p.198

has already been discussed, was clearly seen as belonging to Ahitana because he built it. However other members of his whānau were also said to have rights there — Te Whatahoro said of this weir, "Ahitana had a pa tuna there made with small manuka sticks. He and Paratene [Ahitana's brother] caught eels there."[89] While the area known generally as Te Papanui had a number of various uses (including fishing) attributed to a wide range of people, the "owner" of a *pā tuna* in the stream of that name was said to be Mitai Poneke, who claimed it by *take tupuna*. The use of the *wakarau* close by at Pitorua was also attributed to a single person, Kereopa. Eruera Rangitakaiwaho made the connection between Kereopa's personal rights elsewhere and his hapū affiliation: "Kereopa was the member of Ngatikariware who used to eel at the south end of Makoroingo [stream]." He also said that it was Kereopa who had the use of the lower end of the Awa o Tatahuaki.[90]

As with the use of the Te Papanui *pā tuna* by Mitai Poneke, there is often a distinguishable transmission of fishing rights from a particular ancestor to an individual descendant. This is especially true of many of the fisheries of the *tupuna* Porou. Paratene and Ahitana Mātenga both spoke of the use of a particular eel fishery at Matawhero, known as Te Hīnaki Kaitangata o Porou, because of the circumstances of Porou killing Tōtara there. In later days, the name applied to a *pā tuna* at one end of the Matawhero stream, which was "a pa tuna no [W]Heteriki", a Ngāi Tahutāwhanga descendant of Porou; while other nearby areas were used by his Mātenga relatives "and Matuas". While fishing rights to Matawhero as a whole were used by a number of hapū related to Te Hiko, the use of that particular *pā tuna* was said to be confined to an individual. Likewise, the *pā tuna* Karekare was numbered among the fisheries of Porou, and at the time the Court sat it was regarded as belonging solely to Hokipera, another of Porou's descendants.[91]

A number of fishing resources, often larger ones such as *wakarau* or streams, were connected with certain individuals of high rank within their hapū. This was particularly the case with the most prominent people in the large Rākaiwhakairi hapū; that is, the descendants of Te

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[89] TMH, 28/2/1890, MB 13 p.102. See page 247 *supra*.

[90] Eruera Turei [Rangitakaiwaho], TMH, 28/2/1890, MB 13 pp.104-105, 16/4/1890, pp.312-313; Wi Hutana, TMH, 13/3/1890, MB 13 p.224

[91] Paratene Matenga, TMH, 1/12/1888, MB 10 p.242; Ahitana Matenga, TMH, 6/3/1890, MB 13 pp.152,155, 8/3/1890, p.174; Wi Hutana, TMH, 15/11/1888, MB 10 p.88, 12/3/1890, MB 13 pp.207-208; Eruera Turei [Rangitakaiwaho], TMH, 1/3/1890, MB 13 p.114; Judgment, Otaupuaroaro, 9/4/1890, MB 13 p.287

Hiha, especially Te Piata o te Rangi and Ngāwhawha and their children Te Hiko and Arihia. After being seized from Te Pohehe, the *wakarau* at Te Akau o Roitu passed to Ngāti Te Hiha and Ngāti Whaitongarerewa. However, from that point, the *wakarau* was often referred to as belonging to Tamaihikoia, his brother Te Piata, or his nephew Te Hiko. Eruera Rangitakaiwaho said that Tamaihikoia "had a right to catch eels" at part of the *wakarau* and that Te Hiko "owned" these mouths.[92] It may be that these individuals had a superior or controlling right because of their chiefly status, which they could exercise ahead of the other members of Ngāti Te Hiha and Ngāti Whaitongarerewa who had rights at Te Akau o Roitu; or alternatively they may have been seen as the representatives of those hapū at that fishery, with the rights of others in the hapū being implicitly included in the rights claimed in their names. It may also be significant that Te Pohehe lost the weir because it was believed that he had killed Hautu Te Rangi by "bewitching" him. Some sort of special right may then have passed on to Hautu's sons Tamaihikoia and Te Piata, as those most directly affected by the loss of their father.

Other fisheries were described as the property of both these hapū and the most senior members of these hapū. Again, Te Piata was spoken of in connection with the Te Karokaro o Tamahau *wakarau*, the subject of a disputed claim between Ngāti Rakairangi and Ngāti Hinetoko. Wī Hutana twice stated that the *wakarau* was the property of Ngāti Hinetoko and their associated hapū, but he also said that it belonged to Te Piata — "a wakarau no Ngatihinetoko (te Piata)" — who presumably had some sort of controlling interest as a chief of those hapū. Likewise, the Ngakoau lagoon was generally held to belong to Ngāti Te Hiha and their numerous associated hapū, but both Wī Hutana and Paratene Mātenga ascribed to it something more like personal rights. Wī Hutana said that it had "belonged to" Ngāwhawha and then Te Piata, while Paratene believed that Arihia Ngāwhawha (Ngāwhawha's daughter) was "entitled to" that lagoon, although he did not know "her hapu right or the 'take'".[93] As there is ample record of other people from these hapū fishing in the lagoon, it would seem that the rights of Ngāwhawha, Te Piata and Arihia as referred to here were the rights of hapū representatives or rights of control.

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[92] Eruera Turei Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.235, 9/10/1888, p.301, 28/2/1890, MB 13 p.105, 5/3/1890, pp.141-142; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.506; Ahitana Matenga, TMH, 7/3/1890, MB 13 p.159. See pages 233-234 *supra*.

[93] Hohepa Aporo, TMH, 23/10/1888, MB 9 pp.437,454, 26/10/1888, p.476; Wi Hutana, TMH, 15/11/1888, MB 10 pp.87-88, 22/11/1888, p.150; Paratene Matenga, TMH, 3/12/1888, MB 10 p.246. See page 233 *supra*.

Division and accretion of fishing rights

The way in which some fishing rights remained vested in individuals over time as personal rights, whilst others expanded to encompass the whole of a whānau or hapū, implies that there were a number of different factors affecting the process of transmission of fishing rights from generation to generation. One obvious factor would be the size and yield of the resource in question. It would be highly impractical to pass on a fishing right to a small creek or a minor *pā tuna* to dozens of people, as it would not produce sufficient yield to support so many people or justify the substantial input of labour. Conversely, it would be unlikely for the sole use of a large lagoon to pass to an individual or small group, as much of the valuable resource would go unharvested unless they got the assistance of others, usually relatives. While this undoubtedly did happen to some degree, the workers had such a strong right to part of the product of their labours that the right of the 'owner' to the produce from their resource was no longer an individual one, although it might be a controlling right.[94]

There were other factors beyond the size of the resource that determined which particular descendants of a previous owner or holder of a use right would inherit an interest in that resource. One of the most important of these factors was continuity of occupation. Not all descendants of any particular ancestor would remain on the lands of that *tupuna*, as many would associate more closely with other ancestral lines or would move out of the district to live with their spouse's family. However, 'occupation' did not necessarily require permanent residence on the land in question. Barring extraordinary circumstances, so long as the right continued to be exercised on a regular basis, it was maintained. Given the highly seasonal nature of fishing in the Wairarapa area, this was the course of action followed by a large number of people who held numerous widely scattered ancestral rights across the region.

There is ample evidence that the descendants of an ancestor who had continued to maintain rights on the land (in the sense just given) had a much greater, if not exclusive, right to the fisheries of that ancestor compared to those who had not regularly kept up use of the resource. The claims made by many on the basis of *take tupuna* were rejected because their ancestors had left the land and their rights had been allowed to lapse; although this could also be a function of the Native Land Court's heavy emphasis on rights based on *take tupuna* and *ahi kā*. However, it

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[94] Ballara, pp.349-350

seems that the Court's 'three generation rule' had its roots in genuine Māori custom, even if the Court removed the traditional flexibility found under customary tenure.[95] Even Hēmi Te Miha, whose claim to the Tipua Mapunatea block ultimately failed because his ancestors had not maintained their ancestral rights, admitted under cross-examination "that the rightful owners are the offspring of those who had been in constant occupation."[96] Numerous other claimants from all the parties involved, including Apiata Hakiaha, Wī Hutana, Paratene Mātenga, and Ramari Eramiha, made similar statements regarding the necessity of continuity of occupation (*i.e.* use) for fishing rights. Direct transmission from generation to generation was not strictly necessary, but an absence of longer than about three generations was held to be permanent unless the descendants were subsequently invited back onto the land. Again, this may have been influenced by the Court's use of the three generation rule in earlier cases.[97]

Paratene Mātenga was the only one to state directly that, "Absence for 3 generations would extinguish a claim"; while Ramari Eramiha was a little more circumspect, saying:

> A person's claim would not be diminished by his going elsewhere to live and occupy other land but it would be different if the person remained away for several generations say 3 or 4 but the claim would not be seriously affected by an absence for 2 generations.[98]

This customary practice was necessary to retain some sort of rational basis to the exercise of fishing rights, as Wī Hutana explained: "If descent from a common ancestor is admitted as a 'take' then every Native would have an interest in common in every block of land in the district. Occupation is the chief 'take' on which the claim to land is based."[99] These statements, while all referring to land, must be taken to include fisheries in areas such as Tipua Mapunatea, where the primary value of the land lay in its fisheries.

The Land Court witnesses also gave some specific examples to reinforce their general statements regarding ancestry and occupation rights. The most common circumstance in which certain descent branches lost rights in a particular area was through the emigration of an

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[95] See pages 79-80 *supra*.

[96] TMH, 2/10/1888, MB 9 p.189

[97] Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.515; Wi Hutana, TMH, 24/11/1888, MB 10 p.175, 27/11/1888, p.201; Paratene Matenga, TMH, 28/11/1888, MB 10 p.218

[98] Paratene Matenga, TMH, 3/12/1888, p.250; Ramari Eramiha, TMH, 28/3/1890, MB 13 p.272

[99] Wi Hutana, TMH, 27/11/1888, MB 10 p.201

ancestor, usually female, following marriage. According to Wī Hutana, Kereopa had no proper right to go eeling on the Tipua Mapunatea block because he was a descendant of Kunu, who had left the land when she married Ruapatoi. The example of Hēmi Te Miha, whose ancestor Hinetā-rewa left the land when she married Ngārangitopetopea, has already been touched on, as has that of Te Watarauhi, whose *take tupuna* to a *pā tuna* had lapsed under similar circumstances until he revived it by force.[100]

Other claimants gave an indication that there was not a hard-and-fast rule on the loss of ancestral rights, and that all of a person's rights were not lost or abandoned at some arbitrary cut-off point. Some said that those descendants who had not maintained occupation did not lose all their rights, but rather had a lesser right than those who had stayed. This may also be the result of the imposition of Pākehā styles of tenure on Māori land, as claimants attempted to get as many of their relatives as possible included with them on the title to the land. Hēmi Te Miha mentioned a lesser right belonging to those whose interests were merely ancestral: "The reason why some of the persons in a title only receive a small share is that their interests are only ancestral and are not equal to others who have both ancestral and an occupation right to the land",[101] but this is in reference to the granting of a Crown-derived title to the land. Likewise, when referring to the interests of Porou's descendants, Eruera Rangitakaiwaho believed that while all should have an interest in the block, those "descendants of Porou who have occupied continuously are the persons entitled to the largest share of Porou's interest."[102]

As well as the divisions of fishing rights resulting from the migration of some who had an ancestral right, there were many other ways in which a fishing right could be restricted to certain branches of any descent group. Such instances as dowries of land have already been discussed, and resources were also often left as a legacy to only one child in a family.[103] The separation of a right and its transfer to an offshoot of the group which had previously held it was usually adhered to over time (not allowing for the workings of *take whanaunga* if the resource were a substantial one), so that those who had a right to work a resource which had been given or

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[100] Wi Hutana, TMH, 24/11/1888, MB 10 p.175; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 p.316; see pages 230,235,237 *supra*.

[101] TMH, 2/10/1888, MB 9 p.190

[102] Eruera Turei [Rangitakaiwaho], TMH, 4/3/1890, MB 13 p.132

[103] See pages 233,237-238 *supra*.

bequeathed to someone else did not pass on their rights to their descendants. This was particularly the case with the discrete divisions made amongst the children and grandchildren of the original Ngāti Kahungunu settlers, but more contemporary examples like that of Te Kowhai's dowry and the inheritance of her son Mitai Poneke are also to be found.[104]

In some cases people asserted that all of the descendants of a particular ancestor derived rights from this descent, regardless of their status *vis-à-vis* the land and resources in question. Most claims of this sort were very vague or extended over such a wide area that they would appear to refer more to a hapū right based on descent from the ancestor in question. Such a hapū right would be restricted to those regarded as belonging to that hapū, and branches which had moved away would be excluded after they had ceased to be considered a functional part of the original hapū. An example of the indistinct nature of many of these claims is that given by Eruera Rangitakaiwaho, who told the Court of the ownership of the Waitahiti area: "The descendants of Tutemiha are the persons entitled to the land and also the descendants of Tuawhio and the descendants of Rangitawhanga", which would amount to a very large number of people having rights over a relatively small area, if he was referring to all the descendants of these people.[105] Other such statements were made by those with a less direct relationship to the fishing resource in question, and were clearly made to bolster their own insecure position. Thus Hēmi Te Miha told the Court in the Tipua Mapunatea case that, "my contention is that I am entitled to share in all the portions belonging to Te Hiha through my descent from that tipuna",[106] notwithstanding the absence of his more recent ancestors from the land.

A number of opposite but complementary processes of accretion existed alongside these processes of division of fishing rights over the course of generations. Anyone who moved away from one area and did not return to exercise their fishing rights would lose those rights over time, but generally would gain at least a tacit right to use the fishing resources at their new home in the short term, and would gain a more concrete right as they became permanent members of the group. Wī Hutana spoke of the process of integration which resulted from his marriage to Ani

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[104] Hohepa Aporo, TMH, 24/10/1888, MB 9 p.457, 16/4/1890, MB 13 p.315; Piripi Te Maari, TMH, 3/10/1888, MB 10 pp.15-17, 5/11/1888, p.28

[105] Eruera Turei [Rangitakaiwaho], TMH, 3/3/1890, MB 13 p.116

[106] TMH, 2/10/1888, MB 9 p.189

Hiko: "...in my case my coming to Wairarapa caused my brothers to come as well and they married women of Ngaitukoko hapu and begat children the result of this will be that our hapu name will be merged in that of Ngaitukoko."[107] The offspring of these marriages would not only be known as Ngāi Tukoko, but they would also inherit their fishing rights from their mothers and be able to exercise the fishing rights of this hapū. A fuller investigation of the derivation of *take whanaunga* fishing rights in the swamps around Wairarapa Moana, which could lead to an increase in the number of people with a right to fish at any particular resource, has already been given.[108]

The loss of rights resulting from a migration by a group was not necessarily irrevocable. Paratene Mātenga spoke of a custom by which people who had lost rights in an area through the prolonged absence of their ancestors could be invited back by relatives who retained rights there. This was a discretionary right within the grant of the current owners of the resource, and it could not be insisted upon by the absentee.[109] Hēmi Te Miha claimed that his right at Te Tipua had been revalidated by his invitation back onto the land by Te Hiko, who was a man of some importance in relation to the land in question, even though Hēmi had never taken up the invitation or exercised any rights on the land. In reply to Hēmi's claim, Ani Hiko and her party did not deny that such an invitation might have been made, but they stressed that "this was caused through good will of Hiko as Hemi had no 'take' of his own."[110]

Relationships between land, waters, and fishing rights

The relationship between the 'ownership' and occupation of the land, and of the fishing resources in the waters found adjacent to that land, was generally a very close one. By and large, control of the land extended to control over the resources of the area, although it could equally be said that the control of the land stemmed from and was a reflection of the control of its composite resources. Although far less common, it was also possible for fisheries to be used and controlled

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[107] TMH, 22/11/1888, MB 10 pp.148-149

[108] See pages 237-240 *supra*.

[109] TMH, 28/11/1888, MB 10 p.218, 3/12/1888, p.250

[110] Hemi Te Miha, TMH, 27/9/1888, MB 9 p.166, 2/10/1888, pp.189-190; Judgment, TMH, 16/4/1890, MB 13 p.316

by people other than those who occupied and controlled the surrounding area (both land and water). In the Wairarapa, the Native Land Court regarded fishing rights as simply an element of the parcel of rights which came with 'ownership' of the surrounding land. In his judgment on the Otaupuaroaro portion of the Tipua Mapunatea Block, Judge Alexander Mackay acknowledged that "the use of the eel fishing places was considered a great test of Native ownership", but he then went on to state that:

> The undisputed use and exercise of the rights of fishing would be proof therefore that the mana of the land was with the tribe or hapu exercising this right and to enjoy the rights of fishing it necessarily followed that the right to the adjacent land was essential.

He rejected "the kind of undefined rights obtained by roaming over the land and occasionally fishing in the lagoons and other" as a source of a "permanent claim" to the land.[111] However, this was an inappropriate way to consider fishing rights in important fishing areas, especially ones such as the lagoons to the east of Wairarapa Moana, where the main value of the land was in its fishing resources. In such areas, there is a suggestion that rights and control over the land may have stemmed largely from rights and control over the fisheries.

The Tipua Mapunatea Block was largely unoccupied because of a lack of dry land, especially before the 1855 earthquake and the opening of the lake to prevent the flooding of farmland. Consequently, most of the claimants and counter-claimants attempted to demonstrate their rights to the area as a whole by relating their control over and use of the natural resources on the block, most particularly the eel fisheries (the only other food resources on the block being ducks and a few bird snaring areas).[112] Most of the settlements referred to on the land were *taupahī* or *pahī*, temporary camping spots used during the seasonal round of resource exploitation. When the principal claimants and counter-claimants introduced or summarized their cases, a description of all the fishing resources used by their group and its ancestors was usually the first thing given after the boundaries within which they claimed and their whakapapa had been laid down.

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[111] Judgment, Otaupuaroaro, 9/4/1890, MB 13 pp.291-292,295; Ballara, p.509

[112] Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.239; Hohepa Aporo, TMH, 23/10/1888, MB 9 p.436; Apiata Hakiaha, TMH, 29/10/1888, MB 9 p.518

For example, Wī Hutana introduced Ngāti Te Hiha's claim to Tipua Mapunatea by introducing himself, giving his wife's whakapapa, and describing the boundaries of their claim. He then listed 14 different *wakarau* and *pā tuna* that had been used by the *tūpuna* of the hapū. The areas of the block used after the return of Te Hiha were also defined in terms of the *mahinga tuna* [eel fisheries] used by the claimants' ancestors.[113] Eruera Rangitakaiwaho and the Ngāti Kahukuraāwhitia claimants to the Otaupuaroaro part of the block also emphasized their use of the various *mahinga tuna* on the land. In his initial evidence regarding the whole block, Eruera was unable to name all the eel fisheries on the block because they were too numerous. In the introduction to their Otaupuaroaro claim, he listed 23 of the most important *mahinga tuna*, along with the names of those who worked each. More than 10 were attributed to the ancestor Porou alone. Ngāti Kahukuraāwhitia's summary of claim listed 16 separate fishing areas and 5 lagoons (most of which contained more than one station) which were also used. A number of *taupahī* were also described, but each was associated with one or more of the fishing areas claimed.[114]

It is clear from this alone that rights over and 'ownership' of the Tipua Mapunatea block as a whole was largely reliant on the exercise of the fishing rights associated with that block. This was further indicated by a number of claimants throughout the case. It was recognized that it was not necessary to physically occupy the area to exercise a fishing right, and the food of the land was usually taken to more permanent and less inhospitable settlements to be shared out and consumed.[115] Apiata Hakiaha of Ngāti Rakairangi stated that "many of the places named along the banks of the Ruamahanga belong to parts at a distance beyond", meaning that those who used the block as a food source lived away from the area on higher ground. Wī Hutana agreed, saying that: "The hapus who occupied the outer part of the land also exercised the right of fishing over the inner part of the block.... The inland parts were used by the several hapus for eeling purposes."[116]

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[113] Wi Hutana, TMH, 27/9/1888, MB 9 pp.162-164, 16/11/1888, MB 10 p.91. See page 193 *supra*.

[114] Eruera Rangitakaiwaho, TMH, 27/9/1888, MB 9 p.172, 1/3/1890, MB 13 p.109; Te Whatahoro, TMH, 28/2/1890, MB 13 pp.102-103; Ahitana Matenga, TMH, 8/3/1890, MB 13 pp.174-175; Ngati Kahukuraawhitia Claim, TMH, 9/4/1890, MB 13 pp.286-288

[115] Hohepa Te Wakiumu, TMH, 17/10/1888, MB 9 p396; Ahitana Matenga, TMH, 7/3/1890, MB 13 p.160; Paraone Pahoro, TMH, 27/3/1890, MB 13 p.265; Wi Hutana, TMH, 9/4/1890, MB 13 p.289

[116] Apiata Hakiaha, TMH, 29/10/1888, MB 9 pp.515,518; Wi Hutana, TMH, 13/3/1890, MB 13 pp.220-221

Under customary tenure, these less permanent uses of the land were as valid as residence as a sign of occupation. This point was clearly made by Ahitana Mātenga of Ngāti Kahukuraāwhitia in their claim for Otaupuaroaro: "It is not a custom of the Maori that each generation should have a distinctive mark of occupation. E Taupahi [temporary campsites] and Mahinga Kai were some of the signs of occupation."[117] Paraone Pahoro's claim to part of the Tipua Mapunatea Block on the basis of his ancestor Te Watarauhi's possession of an eel weir and fishing rights on the block has already been examined. The concentration of the Court on rights through *take tupuna* and *ahi kā* seems to have led him to hope that a strong claim to a fishery, through both *take tupuna* and the use of force to strengthen that *take tupuna*, would extend into a land-owning right when Māori land came before the Native Land Court and was converted to a Crown-derived title with its associated bundle of rights.[118]

This complex amalgamation of the land and fishing rights of a hapū into a unitary package, with whānau and households within the hapū having different rights within that package, was the norm in the Wairarapa, but exceptions did occur. There were rare occasions when fishing rights at a particular spot could be and were exercised by a group other than that which controlled or 'owned' the general area or the land adjacent to the fishery. Such a situation was different from the much more common scenario of a fishing right being exercised by a division of the group which had an overright over the general area. For example, in the Te Watarauhi case, there is some suggestion that a division of rights had occurred. A particular branch of the descent group had a right to use the *pā tuna*, but this was exercised within the right of the descent group as a whole to the surrounding area.[119] This larger group's right to use the land may have been little more than nominal because of the limited value of the land beyond the fishing resource, but it was still important as a framework for the apportionment of land into these smaller resource portions, each worked by a sub-group of the larger group, be it at a minor hapū, whānau, or personal level. However, given the highly complex nature of genealogical relationships, the degree of consanguinity within the Wairarapa population, and the corresponding overlap between many hapū, it is often difficult to perceive which kin associations determined the use of resources. In the Tipua Mapunatea case, Apiata Hakiaha of Ngāti Rakairangi told the

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[117] TMH, 11/3/1890, MB 13 p.202

[118] See pages 235-236 *supra*.

[119] Paraone Pahoro, TMH, 27/3/1890, MB 13 pp.261-262

Court that "Harata had no 'take' at Rangatea used to eel there only. Hokipera's occupation was not the same as Harata's...", without attempting to explain why these two individuals, who both came under the umbrella of the Ngāti Rakairangi claim, should have different sorts of rights to the Rangatea lagoon.[120]

These divisions within a group differ from the use and ownership of the land and the use of fisheries by two separate groups. Such separate usage seems generally to have arisen out of a previous gift or seizure by force, usually of the fishing resource. Depending on the terms of the gift (as some gifts conveyed only a life interest), the right of fishery would pass to the descendants of the recipient, while control over the surrounding area would remain with the grantor's descendants. The result of this was that in time the land and the fishery could be "owned" by two relatively separate groups, even if there had been a reasonably close connection between donor and grantee several generations previously. The gap would usually be even wider where the resource had changed hands against the will of the original owner.

There seems to have been a clear division between fishery and land ownership at Tarehu, a five acre area on the Tipua Mapunatea Block which was occupied and had a *pā tuna* on it.[121] Eruera Rangitakaiwaho told the Court:

> Ngatiuhu owned the land and Ngatiapohanga the pa tuna.... The same hapu who occupied the pa at Turi o te Hautumoa owned Tarehu. The pa tuna at Wahanui belonged to Ngatiteapohanga. Haimona Pita owned the outer pa tuna.[122]

If one expands this bald statement, it is found that occupation of the pā at Turi o te Hautumoa was related to various rights over the surrounding area. This pā was occupied by Ngāti Uhu and Ngāti Te Apohanga, as well as people from Ngāti Kahukuraāwhitia, Ngāi Tahutāwhanga, Ngāi Tuawhio, Ngāti Kamuku and Ngāti Komuka (although Ngāti Te Hiha denied a pa had ever existed but admitted Ngāti Uhu's rights in the area). Ngāti Uhu seems to have been a minor hapū of Ngāti Kahukuraāwhitia, with some collateral connection to Ngāti Te Hiha and also to Ngāi Tahutāwhanga. It had a sole surviving member in 1890. Ngāti Te Apohanga lived also at Waitahiti alongside Ngāi Tahutāwhanga and Ngāti Kahukuraāwhitia, to whom they seem to have been closely connected, and it is possible that they were also a minor hapū of Ngāti

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[120] TMH, 29/10/1888, MB 9 p.513

[121] Hemi Epanaia, TMH, 5/12/1888, MB 10 p.275; Eruera Rangitakaiwaho, TMH, 3/3/1890, MB 13 p.120, 16/4/1890, p.312; Judgment, Otaupuaroaro, 9/4/1890, MB 13 p.295

[122] TMH, 3/3/1890, MB 13 p.120

Tahutāwhanga. They also shared the stretch between Aimoana and Wakamarumaru with Ngāti Kahukuraāwhitia.[123]

At some point, probably before the descent lines known as the major hapū Ngāti Kahukuraāwhitia and Ngāi Tahutāwhanga developed further into their numerous offshoot minor hapū, the rights to the *pā tuna* at Tarehu came through some particular circumstance to be held by some person or whānau while the right to the land remained with others, probably close relatives. One whānau expanded to form Ngāti Te Apohanga, while the other became Ngāti Uhu. As both hapū were descended in part from a common group of ancestors, and as they lived in close proximity, it is highly likely that many (if not most) individuals in that area had links to both hapū and were therefore able to exercise rights through both, so that in this case the separation of land and fishery may have been more theoretical than practical.

A more distinct and well-demonstrated division of fishing and land rights arose through the deeds of the ancestor Porou, who lived about the same time as Te Hiha. He had the use of a number of fishing spots, especially *pā tuna*, in the Otaupuaroaro area. The origin of his *take* to these fishing rights was a matter of some dispute. Most people agreed that Porou had killed both Kiore and Tōtara for stealing eels from *hīnaki* at Matawhero, Karewahine or Ngākōtuku.[124] Beyond that, opinion was divided over whether Porou was living on his own land, the land of his son-in-law Terepuku, or his wife Kiritoroa's land. There are sufficient points of difficulty in each argument for Porou's original *take* to remain unclear.[125] The Court decided in the Otaupuaroaro case that:

> Although it is not clear to the Court how Porou originally derived a 'take' to the land there can be no doubt that a right was derived either by intrusion or through some other unexplained cause as it is generally admitted that he exercised fishing rights over parts of the block.

Judge Mackay also ruled that Porou seemed to have had as much right to the land as his various relations by marriage, and that he came onto the land at more or less the same time that they did.

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[123] Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.236, 28/2/1890, MB 13 p.105, 1/3/1890, pp.109-111; Piripi Te Maari, TMH, 5/11/1888, MB 10 pp.38-39; Ngati Kahukuraawhitia Claim, TMH, 9/4/1890, MB 13 p.286; Wi Hutana, TMH, 16/4/1890, MB 13 pp.288,323-324; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 p.322

[124] Eruera Rangitakaiwaho, TMH, 5/10/1888, MB 9 p.245; Paratene Matenga, TMH, 1/12/1888, MB 10 p.242; Ahitana Matenga, TMH, 6/3/1890, MB 13 pp.152-153, 8/3/1890, pp.175, 181,189; Ngati Kahukuraawhitia Claim, TMH, 9/4/1890, MB 13 p.288

[125] Paratene Matenga, TMH, 1/12/1888, MB 10 p.242, 3/12/1888, p.252; Ahitana Matenga, TMH, 8/3/1890, MB 13 pp.175,181; Ngati Te Hiha Claim, TMH, 9/4/1890, MB 13 pp.289-290, 16/4/1890, pp.316-317

From this he concluded that "it would seem that either through neglect or acquiescence of the owners that Porou acquired a claim at any rate to the part over which he exercised rights of fishing."[126]

It is likely that Porou's act of killing Kiore and Tōtara would have reinforced his rights to the eeling spots at which the killings took place if he already owned them, or would have amounted to a 'conquest' if his previous right was more tenuous. The fact that Porou's *take* was not normally held to extend to the surrounding land strengthens the argument that he obtained enduring fishing rights through his use of force at the fisheries rather than through some relationship-based right. Even his descendants claimed that Porou's actions only affected the *pā tuna* involved, in a Pākehā legal environment where occupation rights were crucial to being awarded title.[127] Where the descendants of Porou claimed land, they usually did so in the name of his daughter Marokoau, suggesting that her rights on the land (as opposed to at the fisheries) may have come to her through her mother or husband.[128] Porou's direct descendant Ahitana Mātenga told the Court: "The killing of Totara by Porou was owing to his stealing the eels out of his hinake but it only affected the pa tuna and did not extend to the land.... Porou did not gain any land through killing Totara and Kiore."[129] Porou's fishing rights on the Otaupuaroaro Block were even conceded by the other claimants, and many fishing areas came to be named after him, acknowledging the scale of his interests.[130]

However, unlike the land which was generally claimed in Marokoau's name, many of the fishing rights exercised by Porou were claimed from him by his descendants. Paratene Mātenga and Hokipera had a right to eel at a *wakarau* at Otaupuaroaro that had been Porou's and Marokoau's; Hariata had a right to eel at Waitahiti; and the right to the Matawhero *pā tuna*, where Tōtara was killed, passed down to Wheteriki. The Mātenga family generally had continued to exercise fishing rights over most of the block since the days of Porou, and of all the

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[126] Judgment, Otaupuaroaro, 9/4/1890, MB 13 pp.292-293,295

[127] Eruera Rangitakaiwaho, TMH, 4/3/1890, MB 13 p.126, 16/4/1890, p.313; Ngati Kahukuraawhitia Claim, TMH, 9/4/1890, MB 13 p.288

[128] Eruera Rangitakaiwaho, TMH, 9/10/1888, MB 9 pp.294-295, 16/4/1890, MB 13 pp.312-313; Judgment, TMH, 16/4/1890, MB 13 p.325

[129] TMH, 10/3/1890, MB 13 p.181

[130] Hemi Epanaia, TMH, 4/12/1888, MB 10 p.271; Ahitana Matenga, TMH, 8/3/1890, MB 13 pp.174-175; Wi Hutana, TMH, 15/3/1890, MB 13 p.238; Ngati Kahukuraawhitia Claim, TMH, 9/4/1890, MB 13 pp.287-289; Judgment, Otaupuaroaro, 9/4/1890, MB 13 p.292

composite hapū of Ngāti Kahukuraāwhitia on the Otaupuaroaro Block, Ahitana Mātenga maintained that "Te Aitanga o Porou is the hapu who is entitled to the largest share."[131] Thus, by asserting a powerful claim to the fishing resources of an area, backed by force if necessary, Porou had separated the use of certain fishing resources such as *pā tuna* from the control of the surrounding land. This divergence was then maintained by the continuing exercise of these fishing rights by his descendants.

There were other instances where individuals were acknowledged as having a fishing right without having any *take* to the surrounding land. The rights of Te Watarauhi's son Paiura were considered by Wī Hutana to be confined to the *pā tuna* at Te Hemingi because although Te Watarauhi had secured the *pā tuna,* he had not occupied the land around it.[132] The Hurunuiorangi case was concerned with similar circumstances. It dealt with a block of land in a bend of the Ruamāhanga River some distance upstream of the lake, and has the merit of being one of the earlier cases heard in the district, coming before the Court in 1869. The land was claimed by Te Meihana Hapeta of Ngāi Tahu by descent from Tapuke, who had come from Heretaunga and superseded Rangitāne; while the leading counter-claimant was Namana Takitakitu of Ngāi Taneroa, who claimed by descent from Tea Tawha.[133] The basis of Namana's objection was that Meihana's ancestors, from the time of Tapuke onwards, had persistently taken eels and kākahi from the block without the permission of Namana's ancestors, who lived there. Despite their disapproval, they had been unable to prevent Meihana's ancestors from fishing there. Namana also claimed that Meihana and his people only began residing on the land after the return from Nukutaurua, when Ngāi Tahu arrived back in the area before Namana's family returned. Natanahira Te Nguha, one of Namana's parents, agreed that Meihana's ancestors had taken various foodstuffs off the land for generations but denied Meihana had any *take* to the land. Another of the claimants, Ihaka Te Ruaki, described the eeling activities of Meihana's ancestors as "he mahi noa iho", or 'an unauthorized act'. Meihana maintained that he and his ancestors had always lived on the land and "constantly [got] the eels off it."[134] The acknowledgment by

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[131] Ahitana Matenga, TMH, 10/3/1890, MB 13 p.181, 6/3/1890, p.152; Hemi Epanaia, TMH, 4/12/1888, MB 10 p.271; Eruera Rangitakaiwaho, TMH, 3/3/1890, MB 13 p.122; Judgment, Otaupuaroaro, 9/4/1890, MB 13 p.296

[132] TMH, 14/3/1890, MB 13 p.232

[133] Namana Takitakitu, Hurunuiorangi, 29/3/1869, MB 1H p.103; Te Meihana Hapeta, ibid. pp.109-110

[134] Namana Takitakitu, 29/3/1869, MB 1H pp.104-105; Natanahira Te Ngutu, ibid. pp.106-107; Ihaka Te Ruaki, ibid. p.106; Te Meihana Hapeta, ibid. pp.110-111; Ballara, p.622

Namana's party that Meihana's ancestors had eeled on the land for generations, while denying that they had ever occupied it, suggests that Meihana's people did have a fishing right on the land independent of any occupation right, at least so long as Namana's people were unable to turn them off. The Court, being concerned only with land rights, divided the block between the two groups "for ancestry and occupation".[135]

Another aspect of the relationship between the land and its fisheries was the question of boundaries. Generally, waterways formed a convenient boundary between the territories of neighbouring groups, but in an area like the Wairarapa Moana fringe, where the waterways and their resources were the most important feature of the landscape, using them as boundaries raised a number of difficulties. The situation on the Otaupuaroaro block was so complex that Judge Mackay concluded that there were no defined boundaries, despite the evidence of almost every major witness that different groups had different rights in different areas.[136] These rights were extremely complex and intertwined, but despite the disputes in the Court many fisheries were clearly recognized as belonging to a given group of people. This implies that the divisions between these fisheries were also known and respected. Some large resources, like *wakarau tuna* or streams, were clearly divided into (usually) two parts, often worked by disparate groups, although as *wakarau* often had a number of mouths this removed the need for continuous linear boundaries.[137] In some cases, similar to that of Tarehu, a boundary ran along the edge of a waterway, meaning that while the land along one side belonged to one group, the waterway itself belonged to another. For example, it was acknowledged that Pahoro Te Iho had a right to a piece of land stretching up the Ruamāhanga River from the lake shore, but "Pahoro had no take to the Moana but that his paanga [boundary] extended from the mouth of the Ruamāhanga up the River." A similar statement was made by Eruera Rangitakaiwaho concerning Te Kohai, where he believed the bank of the stream belonged to Te Hiha, but that the waters themselves were his ancestors'.[138]

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[135] Judgment (Judge Monro), Hurunuiorangi, 29/3/1869, MB 1H p.113. The Minute Book does not state the size of the whole block, but Namana's party was granted 160 acres.

[136] Judgment, Otaupuaroaro, 9/4/1890, MB 13 p.291

[137] See pages 243-244,250-252 *supra*.

[138] Paraone Pahoro, TMH, 27/3/1890, MB 13 p.266; Eruera Rangitakaiwaho, TMH, 4/10/1888, MB 9 p.232. See pages 261-262 *supra*.

It was common for boundaries to be delineated by the fishing resources that comprised the outermost extent of any group's possessions. In the detailed evidence given regarding the Otaupuaroaro Block, Eruera once again described Te Kohai, amongst other streams and lagoons, as part of the boundary of the area claimed by his people: "From Te Kohai to Ikaarua thence to Ngakotuku and on to the Lake these are the boundaries of the described block." He also described the neighbouring Waitahiti area in terms of the lagoons and connecting streams that lay along its fringes.[139] This accords with the Māori custom (described by Ballara) of ascribing boundaries radially, rather than lineally — that is, the significant outer points of the area were given, rather than a line encompassing the entire area.[140] Some boundaries giving fishing resources to one of the bordering groups but not the other seem to have been well-established. Wī Hutana acknowledged the rights of the counter-claimants to a certain *pā tuna* falling on a boundary: "Pakoko was the pa tuna near there [Kapiti] it belonged to Ngatirakairangi inland of the pa tuna belonged to te Hiha."[141]

Some resources were however split by boundaries which took no account of their presence. This could happen where a fishing resource was developed on top of an existing boundary. Eruera Rangitakaiwaho told of one instance of this: "Ngakoweko is a pa tuna on the boundary of Tutamio's part. A large part of the wier [sic] is outside but the mouth is within the boundary."[142] Kare Māipi, dug as a boundary ditch and marked as such with a *pou* or post, also contained a *pā tuna*. It was dug in the days of the children of the ancestor Te Popoki. The creek near Makoroingo called Te Awa o Tatahuake also contained a boundary *pou*, put there in recent times by Rihari to mark off Ngāti Kahukuraāwhitia's part from that of their neighbours.[143] Were there not good relations between neighbours, such divided resources could easily cause disputes. It may not be coincidental that Kare Māipi and Ngāmāhanga (also divided by a boundary) were the subject of contested claims over time.[144]

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[139] Eruera Rangitakaiwaho, TMH, 3/3/1890, MB 13 pp.116,119, 4/3/1890, pp.132-133

[140] Ballara, pp.29-30

[141] TMH, 20/11/1888, MB 10 p.138

[142] TMH, 4/10/1888, MB 9 p.235

[143] Hohepa Aporo, TMH, 24/10/1888, MB 9 p.456; Te Whatahoro, TMH, 28/2/1890, MB 13 p.102; Eruera Rangitakaiwaho, TMH, 28/2/1890, MB 13 pp.104,106-107

[144] Eruera Rangitakaiwaho, TMH, 28/2/1890, MB 13 p.106; see pages 233,246 *supra*.

Aspects of management and control

It is much more difficult to assess who exercised control over the lake fringe fishery than it is to make such an assessment for the Wairarapa Lakes proper. On the Tipua Mapunatea block, there was a great deal of overlap between fisheries of different sizes, and some areas were worked by a number of people and groups of widely differing ancestry, each asserting their own rights ahead of those of the others.[145] Such disputed claims over use rights brought with them disputes over who exactly had the right to control and apportion the fishery and its produce. It is therefore difficult to disentangle the rival interpretations of control proposed by the different claimant groups, all of whom were intent on proving their own control over the land and its fisheries.

Many aspects of fishing rights in the Wairarapa lake fringe area which have already been examined serve to illuminate certain facets of control relationships. Sometimes fishing rights were derived from a gift made to a person or group — for example, the area around Ngākiore, containing a number of fisheries, was given by Te Hiha to Pohatu.[146] Such gifts necessarily imply that the grantor had sufficient mana over the land and its people to be able to reapportion resources without outward opposition from others with an interest in the resource. Thus, only chiefs acting with the support of their people would usually have the authority to admit an outsider to an interest on the lands of their hapū.[147] Similarly, only a chief or other person with authority in the community could invite back a person with an ancestral connection to an area to share in the resources of that area once again. Amongst the most widely-documented of these invitations were those made by Te Hiko, the leading chief of Rākaiwhakairi and one of the most important chiefs of the Wairarapa Moana area as a whole, to his relations Hēmi Te Miha and Pateriki.[148]

Affirming one's rights against any encroachment, or successfully impinging on another's rights, were also both assertions of control over the resource in question. Thus Ngāti

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[145] See Judgment, Otaupuaroaro, 9/4/1890, MB 13 p.291

[146] Apiata Hakiaha, TMH, 29/10/1888, MB 9 pp.501,512; Wi Hutana, TMH, 27/11/1888, MB 10 p.191. See page 232 *supra*.

[147] Ballara, pp.315-316,365-366. See pages 14-16 *supra*.

[148] Hemi Te Miha, TMH, 2/10/1888, MB 9 p.189, 16/4/1890, MB 13 p.311; Kahu o te Rangi, TMH, 3/10/1888, MB 9 p.211; Ballara, pp.231-232; see pages 232,257.

Rakairangi based their rights to the Ngakoau lagoon on Tono's victory over Marokiekie and his party, and the subsequent sharing of the *pā tuna* in question by both groups, under the mana of Ngāti Rakairangi.[149] Having affirmed their control of the resource by force, they reaffirmed their control by granting Marokiekie a limited fishing right on their terms. Conversely, control could be established by an unambiguous victory over the previous owner or user of a resource. The vicissitudes of Te Hiha serve to illustrate the workings of *raupatu* on rights to resources. When Ngāti Rongomaiaia caused Te Hiha to flee the area, they assumed the authority previously held by Te Hiha and the hapū that fled with him. Te Hiha only regained his control by defeating the invaders and forcing them to withdraw from the lands, and as an indication of this newly-regained control, he gave part of the disputed area to Muretū, one of the party which had temporarily held the area.[150] In this example the victory came about, and was reversed, through the use of physical force, but it would be sufficient for an aggressor to cause their opponents to flee through fright, so long as the new arrivals reinforced this with occupation and use of the resources of the area.

It was common for Native Land Court witnesses, especially those of chiefly families, to attribute large areas to leading chiefs, most particularly Te Hiha and his descendants. This reflects the role of chiefs as the guardians of and trustees for their hapū and hapū resources. Where chiefs were said to 'own' large areas of land, this did not equate to a personal, exclusive ownership, but reflected their role in the community. Wī Hutana told the Court of the 'ownership' of the lower Wairarapa Valley area:

> The part to the Southeast of Ruamahanga belonged to Tamaihikoia nui through the raupatu o te Hiha and his hapus.
> After Tamaihikoia's death it descended to Ihu o te Rangi and at his death to Hiko and Arihia the right extended to Okourewa the mouth of the Lake to Otauira near Featherston.[151]

However, when Hutana said that the land "belonged to" these people, he did not mean that they personally owned this area to the exclusion of others. They were rather the leading chiefs with whom the area was identified. Mackay's Royal Commission investigation into the ownership of Wairarapa Moana rejected any notion that the chiefs could be considered sole owners of land or fishing resources:

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[149] Hohepa Aporo, TMH, 23/10/1888, MB 9 p.439; see page 233 *supra*.

[150] Wi Hutana, TMH, 13/11/1888, MB 10 pp.58,66-67, 21/11/1888, p.144; Claimants' Statement of Case, TMH, 16/4/1890, MB 13 pp.321-322; see pages 217-218 *supra*.

[151] Wi Hutana, TMH, 26/11/1888, MB 10 p.181

> ...it may be here observed that a New Zealand chief did not possess a sole right to the land, nor yet to eel-preserves or other food-producing places.... there was a right of property in the soil not residing in the chiefs, but in them conjointly with their whole tribe, which they, the chiefs ... were not the sole proprietors thereof...[152]

Many other people in the Land Court in Wairarapa, who were less closely connected to the chiefly descendants of Te Hiha, also averred that the role of the chief was more to do with mana and rights of control rather than sole ownership of the land. Hōhepa Aporo told the Court that, "Hiko held the land under the old mana rangatira not because he alone had a right to it."[153] Hōhepa was referring here to a very personal type of mana, 'mana rangatira' being the mana of a chief, based on his personal qualities and the inheritance of the mana of his chiefly ancestors. He was therefore implying that Te Hiko's important role in the area was closely related to factors such as ability and whakapapa, rather than to the possession of a superior proprietary right. Even Wī Hutana, while normally asserting the 'ownership' of large tracts of land by his wife and her family, allowed that, "The chief had a right over the whole of the land but members of the hapus had only a right to such part as they cultivated or occupied. The Chief would give any part of the waste land to whoever he chose."[154] This is reflective of the rights of control and allocation that chiefs held over the resources 'owned' and used by the hapū as a whole, although it did not extend to a right to interfere with the whānau and personal rights of the ordinary people of the hapū under normal circumstances.[155]

While whānau and households had some control over the resources worked solely by themselves, their right was confined to the use of the resource. All rights of alienation and apportionment lay with those with authority over the area, usually the hapū chief; but resources could not be alienated without at least the tacit approval of those with rights in them. Thus the chiefs and other *kaitiaki* (caretakers or guardians of a resource) would share out the resources of the area under their control amongst the other people of the hapū and community concerned. Generally, there would not be much call for large-scale apportionments, as once allocated, resources usually stayed within the whānau they had been allocated to, and the descent of the resource was regulated within that group. However, the *heke* to Nukutaurua and the death of a

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[152] Wairarapa Commission Report, p.10

[153] TMH, 24/10/1888, MB 9 p.466

[154] TMH, 27/11/1888, MB 10 p.198

[155] Ballara, pp.314-315,348; see pages 11,14-15 *supra*.

large proportion of the population led to many areas being left without their old 'owners'. Te Mānihera Rangitakaiwaho, who had authority over the area around Tarehu, directed his father-in-law to occupy this area when they returned from Nukutaurua; this act was not challenged by anybody else.[156] Percy Smith also gave an account of how Te Hiha placed his followers around the lands recovered from Ngāti Rongomaiaia:

> Pari-o-punehu was the chief *pa* of Te Miha [sic], from which he sent forth his words to the tribe — 'So-and-so, you will go to such a place, to your *kakahi* lake, and there dwell. You, So-and-so, will go and dwell yonder, to your *awa-patete* [pātētē = a small freshwater fish]; whilst you, So-and-so, will return to your *paua* rock, and live there.' In the days of Te Hiha, Ngati-Kahu-ngunu settled down finally on the lands, each family on its own estate.[157]

While this is account has clearly been stylized, it communicates the principles underlying the chief's relationship to the people and resources under his or her control, especially when moving into a new area or dealing with a radical change in circumstances.[158]

Chiefs also seem to have had some control over establishing boundaries between various groups sharing resource areas. For example, Wī Hutana told the Court that Te Hiko fixed a boundary between his hapū and Ngāti Kahukuraāwhitia on the Tipua Mapunatea block. In the Patakakurawhiti case, Te Whatahoro said that, "Pouri was a tangata whai mana nui [a man of great mana] and Rakairangi was another. These Ancestors laid down the boundaries of the land in the Wairarapa."[159] This statement, whilst referring to the original apportionment of the Wairarapa area amongst the Ngāti Kahungunu newcomers, clearly associated the high mana of Pōuri and Rakairangi with their rights to make such a disposition.

The status of those who controlled the fisheries was reflected in other aspects of their relationship with the people living and working on the land. Many chiefs did not themselves work

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[156] Eruera Rangitakaiwaho, TMH, 16/4/1890, MB 13 p.313; Judgment, ibid. p.324

[157] S. Percy Smith 'The Occupation of Wai-rarapa by Ngati-Kahu-ngunu' JPS 13 (1904): 153-165, p.162

[158] Accounts like this one are common in Maori oral history, and such stylizations are common in most forms of orally-transmitted history. Complex elements are simplified and time scales often contracted, while the rhetorical style aids memorization of the account; but the basic dynamics remain. See Judith Binney 'Maori Oral Narration, Pakeha Written Texts: Two Forms of Telling History' NZJH 21 (1987): 16-28, pp.18,27; Te Rangi Hiroa 'The Value of Tradition in Polynesian Research' JPS 35 (1926): 181-203; Anne Salmond 'The Study of Traditional Maori Society: The State of the Art' JPS 92 (1983): 309-332, pp.318-319; David Henige The Chronology of Oral Tradition Oxford: Oxford University Press, 1974, p.5; Jan Vansina Oral Tradition as History London: James Currey, 1985, pp.31,53,130-132

[159] Wi Hutana, TMH, 13/3/1890, MB 13 p.221; Te Whatahoro, Patakakurawhiti Succession, 15/8/1888, MB 8 p.323

the fisheries on the areas under their control, but rather received gifts of produce from those who actually exercised the fishing rights. Eruera Rangitakaiwaho told the Court that Te Hiha's descendants Te Toenga, Te Umutahi and Te Hiko had never actually fished on the Otaupuaroaro block. This was confirmed by Wī Hutana, who explained that chiefs did not occupy *taupahī* or temporary settlements for the purposes of fishing. They did however receive gifts of fish from others who fished on the areas which fell under their authority. According to Paratene Mātenga, Te Retimana Te Ruaki used to catch eels at Ngakoau, but, "he was subject to Hiko and Arihia and used to take the fish caught to them."[160] Rather than being strictly 'subject' to Te Hiko and Arihia, Te Retimana may have had obligations to them which were fulfilled by his giving part of his catch to them. Other chiefly lineages were also beneficiaries of similar arrangements. Eruera Rangitakaiwaho told the Court how the Ngāi Tuawhio, Ngāti Komuku and Ngāti Komuka hapū caught fish and eels on the Otaupuaroaro block and then "used to take presents to" the Ngāi Tuawhio *rangatira* Rangimairehau, and his successors Te Hautumoa, Te Maku, and Kaipohatu, amongst others.[161]

Outside of the Land Court, Hoani Paraone Tunuiarangi discussed this practice in an article about the Kākahimakatea pā, near Lake Pōnui, to the west of the main lake. He wrote about the powerful chief Te Akitu-o-te-Rangi, who lived some time around the late sixteenth century:

> It was the custom in those days — indeed, for many years after — for chiefs of distinction to call upon neighbouring *hapus*, generally more or less related, to either come and work his forests to procure birds or his streams to obtain fish, etc., or otherwise to procure them from their own preserves, and present them to the particular chief who had initiated the proceedings. There was nothing in this that implied any sense of subserviency in those who supplied the products (*mau*) of the forests; they did not hold the position of *rahi* or serfs, such as conquered tribes did, but were free men as much as he to whom the products were given.[162]

Clearly, there was a complex process of obligations at work in these arrangements, with important chiefs providing protection and guardianship for their people, which was acknowledged by the material support given to the chiefs in the form of these gifts.

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[160] Eruera Turei [Rangitakaiwaho], TMH, 5/3/1890, MB 13 p.136; Wi Hutana, TMH, 14/3/1890, MB 13 p.228; Paratene Matenga, TMH, 28/11/1888, MB 10 p.215

[161] Eruera Turei [Rangitakaiwaho], TMH, 5/3/1890, MB 13 pp.136-137

[162] Major Tu-nui-o-Rangi 'Kakahi-makatea Pa, Lower Wairarapa' JPS 13 (1904): 126-129, p.126; see page 89 *supra*.

The Wairarapa lake fringe fishery — a summary

This case study differs from the other three in that it is based largely on a single Native Land Court case, which took over three months to hear but dealt with an area of only approximately 3500 acres, and therefore the issues and emphases are different to those studies where evidence has been drawn from a wider range of cases and sources. In particular, it has been possible to look at many of the less commonly-discussed aspects of freshwater fishing rights, especially those which relate to the ramifications of fishing rights at a family and personal level. In many Native Land Court cases the disposition of large areas of land, claimed by a number of different hapū, was under discussion, and fisheries were usually only one of a number of resources on any given block. In these cases, discussion of fishing rights was often limited to the fishing rights of the hapū and any exceptional events or circumstances relating to the fisheries on the block. However, at Tipua Mapunatea the fisheries were by far the most important resource on the block, and the amount of evidence given meant that many of the nuances of fishing rights in those fisheries were discussed.

One of the overriding impressions gained from the evidence given in the Tipua Mapunatea hearing is that there is limited value in attempting to construct a firm model of exactly who had fishing rights where and on what terms. The complexity of the case makes it clear that the fisheries of the area were not divided neatly into discrete hapū fishing areas, nor were hapū fishing areas divided systematically into general hapū fisheries and smaller fisheries worked by whānau and households. This is not to say that there were not established hapū fishing areas (both fisheries open to most or all hapū members, and general fishing areas under the control or overright of the hapū), but these overlapped and were interlaced with areas under the control of other hapū, and also with fisheries subject to a smaller-scale right. This highlights the difficulty of trying to consider fishing rights only as a part of the bundle of land rights. To look at fisheries merely as a sign of the ownership of the surrounding land leads to the sort of conceptual confusion seen in Alexander Mackay's judgment in the Tipua Mapunatea hearing.

There was also not a single level of hapū affiliation, or of fishing rights based on this. There were a number of large hapū with an interest in the lake fringe fisheries, such as Ngāti Rakairangi, Rākaiwhakairi, Ngāti Kahukuraāwhitia and Ngāti Hinetauira. These hapū were part of the Ngāti Kahungunu iwi but most also had connections to the Rangitāne iwi (and there were

some major hapū in the area who associated primarily with Rangitāne); these two iwi and their hapū had different historical rights to the fisheries. The large or 'major' hapū also had a number of composite smaller hapū, some of these in turn were linked to more than one of the major hapū or iwi. These smaller hapū also claimed to have largely autonomous fishing rights in the area. As a result, most people did not belong to a single small hapū which was part of a single large hapū, but had links to and fishing rights coming from a multitude of kin and ancestral relationships.

This intricacy of rights meant that there was a great deal of debate in the Court over the *pūtake* (source of claim) of many people's rights to fish. Coupled with the length of time spent on hearing the case, it also meant that the rights of individuals were discussed in much greater depth than in many other cases. As a result, this case study has not concentrated on aspects of fishing rights such as *take tupuna* and *ahi kā*, for which there is ample material elsewhere, but has looked at the dynamics of less commonly-discussed aspects such as the determination of who was entitled to use a particular resource in any given generation, and the division and reallocation of fishing rights within kin groups. It has also concentrated on many issues which help to demonstrate the mechanics of control, such as the invitation of relatives onto the land to share in a fishery, the bequeathal of fishing rights to children or other relatives, and the appropriation of fishing rights by the use of force or by input of labour.

Issues such as the gifting of fishing rights to outsiders highlight the connection between those who had authority over the fisheries, and therefore a publicly-sanctioned right to manage and control these fisheries, and the people who actually used the fisheries on a day-to-day basis. It is clear that senior members of the community, most particularly those chiefs descended from Te Hiha and the senior chiefs of other major hapū, had a considerable say in the allocation of fisheries amongst the people of their respective hapū and in any decisions to gift fishing rights to outsiders, and in the overall management of the fishing resource. Yet many of these chiefs did not actually go to the fisheries themselves, especially the smaller seasonal fisheries; but were given fish from these areas by people of their hapū. This would suggest that routine management decisions were made by the fishing experts and heads of the small hapū, whānau and households that actually used a specific fishery. This differs from the control of the nearby fishery at the mouth of Wairarapa Moana, where these same senior chiefs of Ngāti Kahungunu had a much more direct involvement in the eel migration fishery.

CHAPTER SEVEN

The Lake Taupō Fishery

E kore e huri te ra i Makaho, ka mate te tini, te mano!
(Before the sun shall set behind Makaho, they shall be killed in their hundreds and their thousands!)[1]

The Taupō lakes district

Lake Taupō, known in Māori as Taupōnui a Tia or Taupō Moana, is New Zealand's largest lake, with a total area of 606 km^2. The lake is an ancient feature of the volcanic landscape, as are the other small lakes in the area, Rotoaira, Rotokawa, and Rotopounamu. Lake Taupō assumed its present-day form after a massive eruption centred on the Horomatangi Reef in *circa* A.D. 186, which was of sufficient force to be noted in Rome and China. This eruption showered pumice and ash over much of the North Island, killed all life in and around the lake, and set fire to the forest around it. Vegetation gradually returned as the landscape recovered and soils developed. The lake level was higher than at present until the force of the backed-up water re-opened the Waikato River.[2]

The features of the lake bear witness to its volcanic origins. It is fairly flat-bottomed, with depths varying mostly from 100 to 140 metres. The western shores of the lake are dominated by towering sheer cliffs extending both above and below the water. These are interspersed with narrow inlets leading to sandy beaches, at Whangamata, Waihora, Waihaha and

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1 Thus the warrior Tūtetawhā II likened the Waikato forces to the whitebait caught in abundance with a single sweep of the net at Makaho, a point in Lake Taupō near Waihī. John Te H. Grace Tuwharetoa — The History of the Maori People of the Taupo District Auckland: Reed, 1959, pp.183-184; Rev. Hoeta Te Hata (trans. by H.J. Fletcher) 'The Ngati-Tuharetoa [sic] Occupation of Taupo-nui-a-Tia' JPS 25 (1916): 104-11, 26 (1917): 19-30,66-69,91-98,180-187, 27 (1918): 38-46, vol. 26 pp.95-96

2 'Surveys of New Zealand (Report for 1885-86)' AJHR 1886 C-1A Appendix 2 pp.14-15; R.H. Clark New Zealand from the Road — Landforms of the North Island Auckland: Heinemann Reed, 1989, p.88; M.N. Drake 'Maori and European Settlement' in D.J. Forsyth and C. Howard-Williams Lake Taupo — Ecology of a New Zealand Lake Wellington: Department of Scientific and Industrial Research, 1983, p.17; M.H. Timperley 'Geological History' ibid. pp.5-15; R.M. McDowall New Zealand Freshwater Fishes: A Natural History and Guide 2nd ed. Auckland: Heinemann Reed, 1990, pp.421-422; Ann Williams Land and Lake: Taupo Maori Economy to 1860 M.A. Thesis, University of Auckland, 1988, p.203

elsewhere. Beaches are much more prevalent on the other shores of the lake. Columns of lava form features such as the Horomatangi Reef and Motutāiko Island. A number of warm water thermal springs also discharge their waters into the lake, especially near Tokaanu and Waitahanui. Rotoaira too is fed by a large number of subterranean springs. There is only one outlet for the waters of Lake Taupō, the Waikato River. Major rivers entering the lake include the Tongariro (also known as the Waikato because it is regarded by some as the upper extremity of that river), the Tauranga-Taupō, the Kuratau, the Waitahanui, the Hinemaiaia, and the Waihaha. The waters of the lake are low in nutrients, fairly warm and very clear.[3]

The Taupō fishery

Lake Taupō differs markedly from most other freshwater fisheries in New Zealand in that none of the catadromous (sea-migratory) species are present. The force of water passing through the Huka Falls, on the Waikato River 8 kilometres below its source in Lake Taupō, prevents sea-spawning species from returning. Occasional reports of the presence of eels in Lake Taupō or Rotoaira may be the result of eels crawling across the swampy land at the head of the Whanganui River into the Taupō catchment or deliberate introductions, but these too would be unable to return after their breeding *heke* to the sea. As a result, there is a relative paucity of fish species in the lakes, with only those capable of forming land-locked populations present.[4] However, those species that were present were often abundant, and as well as being available to be caught year-round by some fishing methods, there were substantial seasonal fisheries for some species when they came in close to shore in large shoals. Thus, while the Taupō fishery differed from most other fisheries in terms of species, the pattern of rich seasonal fishing supplemented by smaller scale fishing for the rest of the year was similar to that found in many other parts of the country.

The species available in Lake Taupō to pre-contact Māori were kōkopu (*Galaxias brevipinnis*), toitoi (bullies), kōura (freshwater crayfish), and kākahi (freshwater mussels). Juvenile kōkopu were known as inanga, and often regarded as a different fish. Variant names

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[3] Timperley, pp.13-15; Drake, pp.17-18; Williams, pp.12,43-46; 'Surveys of NZ', pp.14-15

[4] H.J. Fletcher 'The Edible Fish, &c., of Taupo-nui-a-Tia' TPNZI 51 (1918): 259-264, p.259; Grace, p.509; Williams, p.54

were given by Taupō Māori to kōkopu according to their colouring and habitat. *G. brevipinnis* is known elsewhere in New Zealand as the kōaro. It is known by that name in nearby Rotoaira, and in this chapter the Taupō population will be referred to as kōkopu, the Rotoaira population as kōaro. The Rotoaira kōaro is a distinctive variant form, and was once regarded as being a separate species unique to that lake. Its juvenile form is also called inanga. Rotokawa, another small lake in the region of Lake Taupō, was not used for fishing purposes. There is an active thermal area around it and its waters are highly sulphurous; the name means bitter lake. While fish were absent, it was an important duck-catching area.[5]

The fish population of Lake Taupō had been killed by the eruption of A.D. 186, necessitating restocking of the lake by Māori when they first settled in the area. According to the traditions of Ngāti Tūwharetoa, fish were brought to the lake by Ngātoroirangi, high priest of the Te Arawa canoe. On reaching the lake and finding no fish there, he shredded his cloak and cast the fragments on the waters. He called on the aid of the god Ikatere, and the fragments turned into inanga and kōkopu.[6] Modern scientific research supports the idea that Māori routinely stocked lakes with fish species not previously present. In completely land-locked lakes like Rotopounamu, near Rotoaira, all the fish species are believed to have been deliberately introduced. Numerous unsuccessful attempts were made over the centuries to establish an eel population in Lake Taupō as well.[7]

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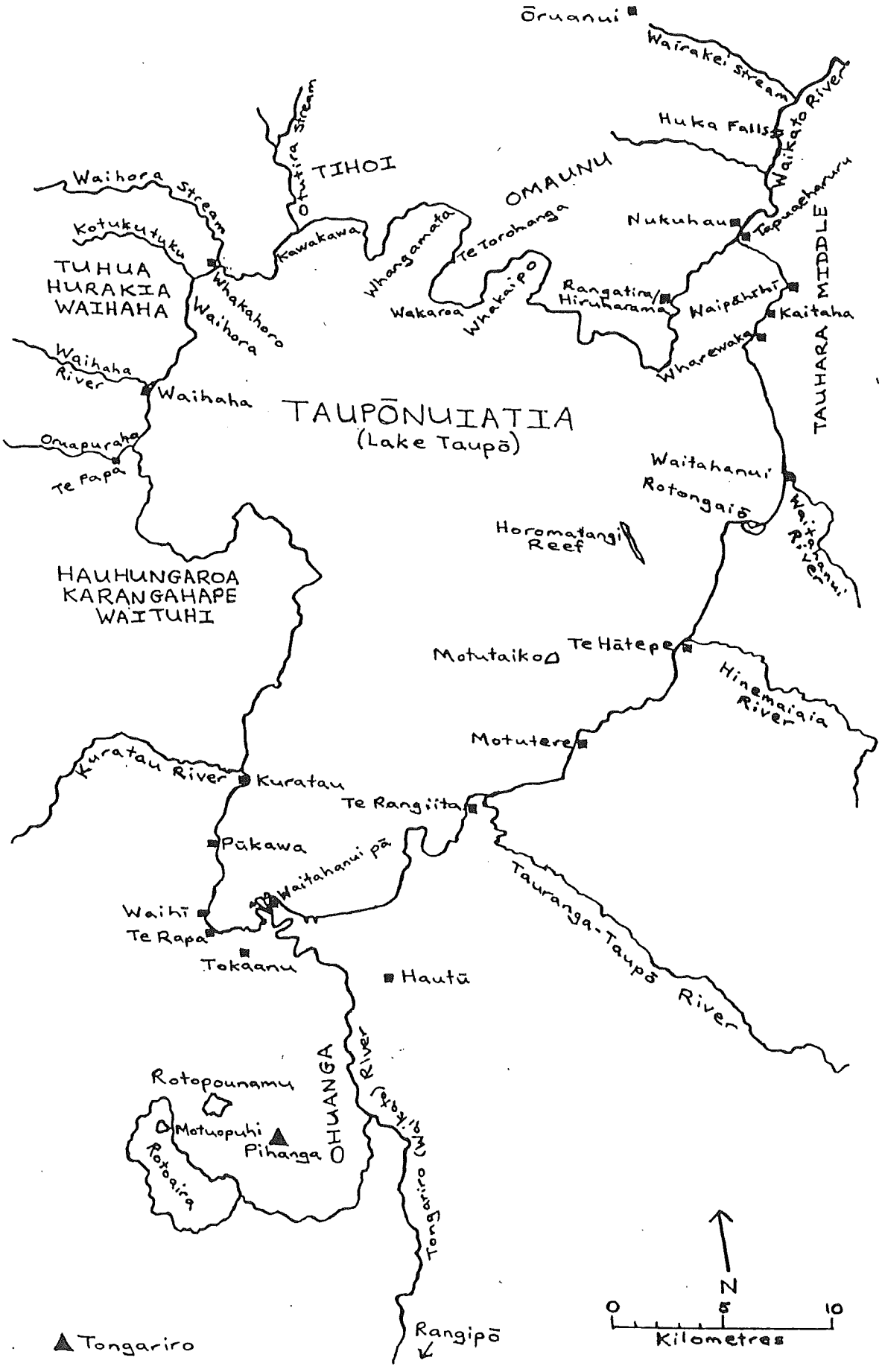
5 Evidence of Te Rangitahau, Tauhara North Rehearing, 8/2/1897, Taupo Native Land Court Minute Book [hereafter TMB] 10, p.139; Memo from Minister of Marine to Minister of Maori Affairs, Marine Department file M 1/7/132, National Archives; Memo D.F. Hobbs to Controller of Wildlife Division, 10/3/1955, M 8/1/2/19, N.A.; Johannes Andersen Maori Place-names, also Personal Names and Names of Colours, Weapons and Natural Objects Wellington: Polynesian Society, 1942, pp.301-302; Grace, pp.167,509-515; V.H. Jolly and J.M.A. Brown (eds) New Zealand Lakes Auckland: Auckland University Press, 1975, pp.296-297; W.J. Phillipps 'The Koaro: New Zealand's Subterranean Fish' NZJST 7 (1924): 190-191, p.190; Williams, pp.55-57

6 Grace, p.61; Samuel Locke 'Historical Traditions of the Taupo and East Coast Tribes' TPNZI 15 (1882): 433-459, p.435; Ranginui Walker 'The Relevance of Maori Myth and Tradition' in Michael King (ed.) Te Ao Hurihuri — Aspects of Maoritanga (2nd ed.) Auckland: Reed Books, 1992, p.181. One version says that Ngātoroirangi killed the fish already in the lake first: Te Hata, vol. 25 p.105.

7 Secretary of Marine to T.A. Strichen, 12/1/1950, M 1/7/5, N.A.; Fletcher, p.259; Grace, p.509; McDowall NZ Freshwater Fishes, pp.112,310-311,332,421-422

Map 3 Lake Taupō



The kōkopu was the most important food species for Taupō Māori, in both its adult and juvenile or inanga form. The adult kōkopu lives under cover near the lake shore or at the bottom of tributary streams. Kōkopu were caught by a variety of methods, depending on the area and the stage of the life cycle. In summer and early autumn basket nets baited with kōura were set at favoured fishing grounds in deep water. In autumn and winter, bundles of fern were set and left, then lifted during the day and the kōkopu gently shaken out. They could also be bobbed for in the rivers, or, most simply, gathered from the shores of the lake when cast there by westerly storms. The adult kōkopu usually measured about 20 cm in length.[8]

The inanga swims along the lake edge and up the rivers in large shoals, or basks in the warm coastal shallows in summer. When passing up the rivers, the inanga were taken in weirs or *pā inanga* which extended part way across the water, channelling the fish into a small *hīnaki*. In the lake itself, large drag nets up to 100 metres long were used, mostly in certain grounds in the shallows off the eastern shores of the lake. They were strung between two canoes, with the fish being driven into the nets. The inanga were taken in the rivers in spring and early summer, and in the lake in spring and summer. Like the adult kōkopu, the inanga were sometimes washed ashore on the eastern beaches and gathered as food.[9]

Kōura were also taken as a food species, and reached a much greater size in Taupō than elsewhere in the country. They were caught by means of dredge nets attached to a rake-like frame which was dragged across the lake bottom from a canoe. This method was used in summer and autumn, some of the kōura being used as bait for the concurrent kōkopu fishing. Other methods used were crayfish pots, bunches of fern, and also simple groping, a method often used by women. Kākahi were also gathered by means of the dredge net or by hand, but were a less popular food source. Toitoi too were not utilised when other fish were available.[10]

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8 J.S. Armstrong 'Notes on the Biology of Lake Taupo' TPNZI 65 (1935): 88-94, pp.91-92; P. Burstall 'Trout fishery — history and management' in Forsyth and Howard-Williams, p.119; Fletcher, pp.259-261; Grace, pp.510-511; McDowall, p.416

9 Elsdon Best Fishing Methods and Devices of the Maori Wellington: Government Printer, 1929, pp.203-205; Fletcher, pp.261-262; Grace, pp.184,512-513; Florence Harsant They Called Me Te Maari Christchurch: Whitcoulls, 1979, p.35

10 Armstrong, pp.91-92; Best, p.229; Fletcher, pp.262-263; Grace, pp.513-514; Alfred K. Newman 'On Maori Dredges' TPNZI 37 (1904): 138-144, pp.139-141; Williams, pp.60,74,91

By far the most significant fishery in Rotoaira and its tributary streams was the kōaro fishery. The fish were widely believed to hibernate in the underground streams feeding the lake, and to return to the lake in October and November, when they were caught in *hīnaki* with leading nets. It is now known that kōaro do not hibernate underground, but rather spend the winter on the lake bed. On their spawning journey to the springs in March the kōaro were caught in the same way with the nets turned around. They were also caught in scoop nets in the lake itself. Other species were also taken, including the plentiful kōura and kākahi.[11]

Māori occupation and control of the Taupō district

Archaeological evidence suggests that Māori occupation of the area around Lake Taupō dates from at least the twelfth century A.D. There is some evidence of bush clearance to the south-east of the lake in about A.D. 1200, while bones found in a midden in the Whakamoenga cave, to the west of the lake, have been dated to the fourteenth and fifteenth centuries. By this time population pressures in the coastal areas were forcing people to migrate inland. The earliest inhabitants appear to have established temporary settlements along the lake and the Waikato River before settling permanently.[12]

Ngāti Tūwharetoa tradition gives Tia and Ngātoroirangi as early visitors to Lake Taupō; both came to New Zealand on the Te Arawa canoe. Travelling up the Waikato River, Tia was the first of the pair to reach the lake. He found the numerous Ngāti Hotu and Ngāti Ruakopiri already in residence at the lake, with the even older Ngāti Kahupungapunga and Marangaranga to the north. Tia finally settled at Tītīraupenga, to the north-west of the lake. Many Native Land Court claims were based on unbroken occupation from Tia's time, especially to the west and north. The lake and district take their name from him, as he thought cliffs on the

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[11] Wi Takarei Poinga, Rotoaira, 18/2/1954, Tokaanu MB 31 pp.23-24; Fletcher, pp.263-264; Grace, pp.514-515; W.J. Phillipps The Fishes of New Zealand Vol. 1 New Plymouth: Thomas Avery & Sons, 1940, pp.36-37; Phillipps 'The Koaro', p.190; Walker 'The Relevance of Maori Myth', pp.181-182; Journal of Richard Taylor, Alexander Turnbull Library qMS 1985-1990, 26/6/1846, Vol. 4; 10/3/1849, Vol. 6

[12] Burstall 'Trout fishery', p.1; Barbara Cooper The Remotest Interior: a history of Taupo Tauranga: Moana Press, 1989, p.11; Williams, pp.91-93,203-206

lake shore looked like his rain cloak or *taupō*, hence Taupōnui a Tia.[13]

Ngātoroirangi followed shortly after Tia, but he deviously convinced the sceptical Tia that he had in fact arrived before him and thus had a prior claim. He also bespoke the lake by casting his great spear Kuwha into the waters, climbed Tongariro, and brought fish to the lake. He did not remain in the district, but returned to the Bay of Plenty. Ngāti Tūwharetoa trace their descent and claim their mana from Ngātoroirangi, who was a tohunga of formidable powers, but few claims based on occupation are made in his name.[14] The earlier inhabitants of the lake region found by Tia and Ngātoroirangi, Ngāti Hotu and their associates Ngāti Ruakopiri, are not well represented in tribal tradition as they were later conquered and absorbed by Ngāti Tūwharetoa. Grace remarked that:

> ...difficulty was encountered in obtaining reliable information on Ngati Hotu from the present occupants of the Taupo district, mainly because of the old chiefs being reluctant to give genealogical tables showing descent from a tribe defeated and absorbed by their forebears.[15]

When Ngāti Tūwharetoa arrived in about the sixteenth century, it took several generations for them to completely subsume Ngāti Hotu. Grace described the process as one of "diplomatic intermarriage and conquest in war."[16]

Another migrant tribe were Ngāti Kurapoto, who came to the north-eastern part of the lake in the generation after the arrival of the Te Arawa canoe. They displaced Ngāti Hotu from some lands in the area, pushing them southwards. Kurapoto remained an important ancestor for people living in that area, although most of the hapū claiming descent from Kurapoto were also descended from Tūwharetoa. The Ngāti Raukawa and Ngāti Maniapoto iwi also came to be influential to the north and west, and there was a great deal of intermarriage between these tribes and Ngāti Tūwharetoa. Many of the hapū of that western area could claim from more than one iwi line. Some claimants to the north of the lake gave Hotu-mutu (the eponymous ancestor of

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[13] Te Heuheu Tukino, Tauponuiatia, 16/1/1886, TMB 4 p.39; Hitiri Te Paérata, Tauponuiatia West, 8/3/1886, TMB 4 p.321; Te Papanui Tamahiki, Waihaha, 9/2/1887, TMB 7 pp.10,66; Barbara Cooper, pp.7,11; Grace, pp.29,58-62,80,84; Te Hata, vol. 25 pp.104-105

[14] Eru Poihipi, Rangatira, 15/22/1886, TMB 4 p.196; Barbara Cooper, pp.7,11; Grace, pp.21,29,61-67; Locke, p.435. One example of an occupationary claim is Paora Te Rauhihi of Ngāti Rauhoto, Oruanui, 9/4/1868, TMB 1 p.45

[15] Grace, p.113. John Te Herekiekie Grace published his comprehensive history of Ngāti Tūwharetoa, drawn from traditional sources and Native Land Court records, in 1959. His mother was a descendant of the senior *ariki* line of Ngāti Tūwharetoa, while his grandfather Thomas Grace was an early missionary in the Taupō area.

[16] Barbara Cooper, p.11; Grace, pp.19-20,80-84,113-118

Ngāti Hotu) as well as Kurapoto and Tūwharetoa as ancestors on the land, though they named Ngāti Tūwharetoa hapū and stressed successive conquests.[17] Tūwharetoa himself was a sixteenth century chief of a Te Arawa hapū at Kawerau. He did not actually live at Taupō, even though he is the ancestor from whom all Land Court claims in the area were based. He had several sons and grandsons, some of whom travelled to their Ngāti Kurapoto relatives at Taupō following military set-backs in their home district after their father's death.[18]

The establishment of Ngāti Tūwharetoa in the Taupō area was a gradual process, with some of Tūwharetoa's immediate descendants fighting the Taupō tāngata whenua but not remaining in the area. Tūwharetoa's grandson Ruawehea, his great-grandson Waikari, and his more distant descendant Tūrangitukua (ancestor of the *tuakana* line of Ngāti Tūwharetoa) came and achieved a more lasting victory over Ngāti Hotu and Ngāti Kurapoto. The name Ngāti Tūwharetoa dates from this time. The different members of this party settled around the lake, and continued their skirmishes with the other tribes, Ngāti Hotu finally being pushed into the upper Whanganui region in the time of Tūrangitukua's children. Several of Tūwharetoa's descendants are associated with particular parts of the lake district which they occupied. Of those already mentioned, Ruawehea settled at Pūkawa and around the western shore, Waikari at Te Rangiita, and Tūrangitukua at Tokaanu.[19]

In later generations, Ruawehea's great-nephew Te Rangiita became one of the key ancestors to lands all over the Taupō district. His Ngāti Whanaurangi line became the war leaders of Ngāti Tūwharetoa for several generations, and were strongest in the north, east and south of the region; while the *upoko ariki* line rested with the Te Aitanga a Huruao descendants

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[17] Ngāti Tūwharetoa and Ngāti Raukawa: Hitiri Te Paerata, Tauponuiatia West, 8/3/1886, TMB 4 pp.320-321; Te Papanui Tamahiki, Waihaha, 7/2/1887, TMB 7 p.66; Tini Waata, Waihaha Names, 31/5/887, Judge Scannell's Minute Book [hereafter SMB] 2 p.66. Ngāti Tūwharetoa and Ngāti Kurapoto: Hohepa Tamamutu, Oruanui, 8/4/1868, TMB 1 p.37; Hohepa Tamamutu, Omaunu, 17/3/1869, TMB 1 p.211; Te Waaka Tamaira, Rangatira, 11/2/1886, TMB 4 pp.165-166; Wi Maihi Maniapoto, Tauhara Middle Subdivision, 22/5/1886, SMB 4 p.46. See also Grace, pp.117-118,156-158; Te Hata, vol. 25 pp.107-108; Val Raymond Ngā Marae o Ngāti Tūwharetoa: Drawings of Marae around Lake Taupo Auckland: Reed, 1992, p.40

[18] Paora Te Rauhihi, Oruanui, 8/4/1868, TMB 1 p.36; Te Heuheu Tukino, Tauponuiatia, 16/1/1886, TMB 4 p.39; Grace, pp.19-21,103-105,127-130; Te Hata, vol. 25 p.108. See pages 290-291 *infra*.

[19] Te Puataata Alfred Grace, Motu-o-puhi, 9/2/1955, Tokaanu MB 32 p.80; Grace, pp.20,118-120,127-132; Te Hata, vol. 25 pp.108-109; Mary Newman Archaeological Investigation in the Vicinity of Lake Rotoaira and the Lower Tongariro River 1966-1971 Wellington New Zealand Historic Places Trust, 1988, pp.3-4; Raymond, p.28

of Tūrangitukua in the south. The two parties were brought closer together by strategic inter-marriages, while Te Rangiita married a high-ranking woman of Ngāti Raukawa.[20]

Te Rangiita had four daughters and four sons. The eldest daughter Parekāwa and her brothers Tamamutu, Manunui, Meremere and Tūtetawhā were all forceful characters, and became eponymous hapū ancestors under the umbrella name Ngāti Te Rangiita. The lands under Te Rangiita's control were divided amongst these five. Tamamutu lived to the east of the lake, at Motutere. He gave vast tracts of land at Hauhungaroa and Tuhua, west of the lake, to his sister Parekāwa. As the eldest of the family she was of great mana, and she was able to mobilize people all around her lands in the west to gather a great feast of *huahua* (preserved birds) for her favourite brother, Tūtetawhā. Manunui's lands were around Pūkawa; Meremere's at Kuratau; and Tūtetawhā had lands around Rangatira. Parekāwa's lands in the west passed down to her descendants, who intermarried with Ngāti Raukawa.[21]

There followed a quieter period in the Taupō district, in terms of the sorts of events which comprise oral tradition. The paramount chiefs or war leaders continued to be drawn from amongst Tamamutu's descendants until about the end of the eighteenth century, while Tūrangitukua's male line (known as Ngāti Te Aho) remained *upoko ariki*. The chiefs of Ngāti Te Aho then turned to Herea of Ngāti Pēhi (later Ngāti Tūrumakina), a descendant of Tūrangitukua and Te Rangiita's sister Tūrumakina. His main pā was at Waitahanui, on the Tongariro River delta, where most of the Ngāti Tūwharetoa lake population was concentrated. He had fought well against Tūhoe and other raiders, and it was hoped that Herea's connections with tribes to the north and west would help protect from threats of invasion from those quarters. He later took his son's name Te Heuheu, and was the first of the line of chiefs named Te Heuheu Tūkino, of the hapū Ngāti Te Mahau.[22] Te Heuheu Tūkino II, or Mananui, succeeded his father in the mid

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[20] Te Waaka Tamaira, Rangatira, 11/2/1886, TMB 4 p.166; Te Heuheu Tukino, Tauranga No. 1, 1/4/1886, TMB 5 p.122; Hitiri Te Paerata, Waihaha, 10/2/1887, TMB 7 p.13; Grace, pp.21-22,156-162

[21] Hohepa Tamamutu, Oruanui, 8/4/1868, TMB 1 p.38; Hitiri Te Paerata, Tauponuiatia West, 8/3/1886, TMB 4 pp.317-322; Tini Waata, ibid. pp.339,342; Taniora Te Tahuri, Pukawa, 22/3/1886, TMB 5 pp.28-29; Te Papanui Tamahiki, Waihaha, 9/2/1887, TMB 7 pp.10-11,64,75-76; Hitiri Te Paerata, ibid. pp.19-23; James Belich Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century Auckland: Allen Lane/The Penguin Press, 1996, p.93; Grace, pp. 160,163-169,172,177-185,229; Te Hata, vol. 26 pp.21-24, 27-30,66-69,93-96; Raymond, p.14

[22] Te Heuheu Tukino, Waihi Kahakaharoa, 20/3/1886, TMB 5 p.16; Hohepa Tamamutu, Oruanui, 8/4/1868, TMB 1 pp.32,39; Omaunu, 17/3/1869, TMB 1 p.211; Te Waaka Tamaira, Rangatira, 11/2/1886, TMB 4 p.166; Drake, pp.18-19; Grace, pp.199-200,209,221-226,229-231 Te Hata, vol. 26 pp.180-186; 'Te Heuheu Tukino I',

1820s. His selection was neither automatic nor immediate, but was achieved by virtue of his efficacy in repelling the threat from Ngāti Tūwharetoa's now musket-armed northern neighbours, and he became a chief of tremendous mana and influence throughout the central North Island. He was killed in a landslide at his pā at Te Rapa in May 1846.[23] It was in the latter years of Te Heuheu Mananui's life that the Pākehā influence came to be felt in Taupō.

Pākehā appropriation of control of the Taupō fishery

The impact of Pākehā was felt in Taupō before the Pākehā themselves arrived. Pressure from the armed northern tribes was pushing other tribes southwards before them, and Taupō lay in the path. In the late 1820s sections of Ngāti Raukawa, including people from the western lake, departed to join Te Rauparaha at Kāpiti. An armed party of Ngāti Maru and Ngāti Raukawa also sacked the Taupō district around this time, and Ngāti Tūwharetoa began selling flax in order to buy guns. However, in the early 1830s they were forced to take refuge on their island pā of Motutāiko to avoid ongoing depredation from armed war parties, although they were strong enough to ensure peace was made.[24] The musket was not the only Pākehā import to be of great influence around Taupō, as pigs and potatoes were also introduced around this time. By the late 1830s large areas of land around Rotoaira had been cleared to allow potato cultivation.[25]

From the late 1830s Pākehā themselves began to arrive in the district, with visitors including the Rotorua missionary Thomas Chapman and lay visitors and explorers such as John Bidwill, Ernst Dieffenbach, E. Jerningham Wakefield, and George Angas. From the mid 1840s missionary visits became more frequent, from both Roman Catholic and Anglican missions. The Whanganui-based Anglican missionary Richard Taylor came often in the mid 1840s; his fellow

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The People of Many Peaks: The Maori Biographies from The Dictionary of New Zealand Biography, Volume 1, 1769-1869 Wellington: Bridget Williams Books and Department of Internal Affairs, 1991, pp.165-167

[23] Barbara Cooper, p.11; Grace, pp.233-241; 'Te Heuheu Tukino II', PMP, pp.167-169

[24] Te Puataata Alfred Grace, Motu-o-puhi, 9/2/1955, Tokaanu MB 32 pp.63-78; Grace, pp.237,255-272; Mary Newman, pp.3-4; Waitangi Tribunal The Pouakani Report 1993 (Wai 33) Wellington: Brooker and Friend, 1993, p.47

[25] Mary Newman, p.14; Pouakani Report, p.47; Williams, p.207

Church Missionary Society missionary Rev. Spencer had a mission at Motutere briefly from 1843, but the Wesleyans were the first to achieve a permanent presence in 1848 when Thomas Skinner established himself at Rotoaira. In 1850 Skinner left, and a Catholic mission was established at the south of the lake. While Te Heuheu himself refused to adopt Christianity, he was keen to have a missionary presence in the area.[26]

There was less of an official presence in the Taupō area in the 1840s, with annexation (as opposed to Christianity) having little real effect on the way that Ngāti Tūwharetoa conducted their affairs. A number of chiefs, including Te Heuheu's brother Iwikau and the northern Taupō chief Te Poihipi Tukairangi, had gone to the Bay of Islands at the time of the signing of the Treaty of Waitangi to learn about its conditions, but they did not have the authority to sign on behalf of Ngāti Tūwharetoa on that occasion. Iwikau signed the Treaty at Rotorua, but when Te Heuheu himself arrived he refused, saying that he would not subject his mana to that of a woman, and he made Iwikau return the blankets he had been given upon signing.[27]

Many of the other leading chiefs of Ngāti Tūwharetoa felt more confident in expressing their independence after the death of Te Heuheu Mananui in 1846. The telling of early Ngāti Tūwharetoa history tends to concentrate on the key figures of tradition, such as the paramount chiefs, but as expressed by the Waitangi Tribunal in its Pouakani Report:

> By 1840, the region around Lake Taupo was peopled by a number of different hapu led by chiefs who operated independently of one another, but not in total isolation. There was a form of confederation of the various hapu whose lineages could be traced back to Tuwharetoa.[28]

One such independent chief was Te Herekiekie of Tokaanu, who as a chief of Ngāti Te Aho was *tuakana* to the elder and more widely-connected Iwikau, with whom he disagreed over the burial of Mananui's bones in the crater of Mount Tongariro. There were powerful chiefs to the north of

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[26] George French Angas Savage Life and Scenes in Australia and New Zealand: being an artist's impression of countries and people at the Antipodes London Smith, Elder, and Co., 1847, vol. 2 pp.109 ff.; Barbara Cooper, pp.11-12,17-26; Grace, pp.383-386,437; Janet Murray 'A Missionary in Action: The Rev. Richard Taylor and Christianity among the Wanganui Maoris in the 1840s and early 1850s' in Peter Munz (ed.) The Feel of Truth: Essays in New Zealand and Pacific History Wellington: A.H. & A.W. Reed, 1969, pp.199-200; Journal of Richard Taylor, 8/11/1843, Vol. 2, 20/2/1845; Vol. 3; Pouakani Report, p.47; Edward Jerningham Wakefield Adventure in New Zealand from 1839 to 1844 Christchurch: Whitcombe and Tombs, 1908, pp.422-427

[27] Journal of Richard Taylor, 1/1/1845, Vol. 3; Grace, pp.238,437; Claudia Orange The Treaty of Waitangi Wellington: Allen and Unwin, 1987, pp.68-69,76; R.J. Walker 'The Treaty of Waitangi as the Focus of Māori Protest' in I.H. Kawharu (ed.) Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi Auckland: Oxford University Press, 1989, pp.267-269

[28] Pouakani Report, p.26. See pages 324-325 *infra*.

the lake, including Te Poihipi Tukairangi and Hōhepa Tamamutu; to the west Te Paerata of Ngāti Tūwharetoa and Ngāti Raukawa was very influential, as was Matuahu around Rotoaira.[29] It is clear that there was no single iwi authority figure who could exercise control over the whole iwi, and by extension the whole lake, except in extreme circumstances such as invasion by outside iwi.

Many of the senior chiefs of Ngāti Tūwharetoa resisted the encroachment of the new Pākehā state on their district. Te Heuheu Mananui remained sceptical of the benefits offered by colonization, and was determined to remain in control of the Ngāti Tūwharetoa people and *rohe*. From the outset he opposed the presence of any settlers among Ngāti Tūwharetoa, except for missionaries and traders, and refused to sell land to the government. He told Jerningham Wakefield in 1841 that he was welcome to visit, but warned him that:

> You white people are numerous and strong; you can easily crush us if you choose, and take possession of that which we will not yield; but here is my right arm, and should thousands of you come, you must make me a slave or kill me before I will give up my authority or my land.[30]

When Iwikau succeeded Mananui in 1846, his policies were the same, and he continued to restrict land sales. He was supported in this by the missionary Thomas Grace, who arrived at Pūkawa in 1855. Iwikau held a great hui at Pūkawa in 1856 to open Hinana-ki-uta Hinana-ki-tai, his new *pātaka* (storehouse), with leading chiefs coming from all over the country. At this hui were discussed the growing intrusions of the Crown and the new settler government on Māori autonomy, and the burgeoning Kīngitanga or King Movement. Iwikau was not keen to associate himself or Ngāti Tūwharetoa with Kīngitanga itself, as Grace warned him of the likelihood of war with the Crown and the troublesome consequences that would follow. He was however supportive of the idea of the *Rohe Pōtae*, an area centred on Tongariro in which no Pākehā roads or

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[29] It is unlikely that this degree of independence from the nominal paramount chief was new, but it is much better recorded by outside observers in the contact period. Te Puataata Alfred Grace, Motu-o-puhi, 9/2/1955, Tokaanu MB 32 p.70; Barbara Cooper, pp.13-15; G.S. Cooper Journal of an Expedition Overland from Auckland to Taranaki, by way of Rotorua, Taupo and the West Coast Auckland: Williamson and Wilson, 1851, pp.252,294; Grace, pp.241-242,429-430,435-436; Journal of Richard Taylor, 21/2/1845, vol. 3; 3/7/1846, vol. 4; 13-14/3/1849, vol. 6

[30] Wakefield, pp.422,427. See also Orange, p.124; Journal of Richard Taylor, 1/1/1845 & 20/2/1845, vol. 3

settlement were to be allowed. Iwikau also kept Ngāti Tūwharetoa out of the fighting in Taranaki and Waikato in the 1860s.[31]

However, after Iwikau's death in 1862 Mananui's son Horonuku (Te Heuheu Tūkino IV) supported his Waikato kin against the Crown. Some western hapū under Te Paerata were involved in 1864 in the fighting at Orakau, while Horonuku's forces arrived just too late. Taupō became a haven for many of the Waikato refugees. Some chiefs at the north stayed out of the fighting but were sympathetic to the government side.[32] Taupō became involved in the wars again in 1869 when Te Kooti was active in the district. A number of Ngāti Tūwharetoa sided with him, but Te Kooti was defeated near Rotoaira at Te Porere. While Te Kooti escaped, Horonuku surrendered; but because of the Te Heuheu family's friendship with Native Minister Sir Donald McLean Horonuku was treated leniently. On that occasion a number of chiefs, including Te Poihipi Tukairangi of Nukuhau and Hōhepa Tamamutu of Ōruanui, and Kīngi Te Herekiekie and Hare Tauteka in the south, came out much more strongly in favour of the Government, again signalling their authority in their own districts.[33]

The Pākehā presence in the lake area was negligible throughout most of the mid 1860s — unsuccessful attempts were made to buy land at Rotoaira in 1868, and land dealing remained very slow. The first inroads were made to the north of the region, when there was increasing pressure for the area to be opened up for settlement after Te Kooti's expulsion. A permanent Armed Constabulary garrison was established at Tapuaeharuru, now the town of Taupō, and the Native Land Court investigated some blocks to the north and north-east of the lake. Road-building started in the 1870s, and steamers first appeared on the lake in 1874. Government land purchase attempts resumed in 1875, with areas to the north-east being sold, and by the 1880s there were also some private land purchases made to the north of the lake. The Land Court returned to Tapuaeharuru in 1880 to hear more cases around the northern fringes of the lake.

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[31] Barbara Cooper, p.27; Grace, pp.401,439-452; Orange, p.142; Pouakani Report, pp.49-51; Alan Ward A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand Auckland: Auckland University Press, 1973, p.99

[32] James Belich The New Zealand Wars and the Victorian Interpretation of Racial Conflict Auckland: Auckland University Press, 1986, pp.128,131,167,171; Barbara Cooper, pp.14,27,35; Grace, pp.410, 459-468; Pouakani Report, pp.51-54; A. Walton 'The Population of the Lake Taupo Region, New Zealand, 1839-1859' NZJA 8 (1986): 73-88, p.83; Williams, p.212

[33] 'Papers Relative to the Military Operations against the Rebel Natives' AJHR 1870 A-8, p.23 ff.; Belich The New Zealand Wars, pp.279-281; Barbara Cooper, pp.15,42-46; Grace, pp.486-490; Pouakani Report, pp.55-56

Settlement brought with it the same consequences for Taupō Māori as elsewhere. Major Scannell (then Resident Magistrate, later to be Native Land Court judge) reported with his 1881 census returns that the population had reduced noticeably since his arrival in 1869.[34]

By the early 1880s Pākehā were also making inroads into the *Rohe Pōtae* or King Country, which included the western part of the Taupō district and lake. This brought Ngāti Tūwharetoa into more contact with the Pākehā state and society, and encouraged them to bring the whole Taupō district to the Native Land Court in 1886 as one huge Taupōnuiatia block, once some safeguards against uncontrolled alienation had been put into place.[35] Large amounts of land stayed in Māori hands around Taupō, especially when compared with some other regions, but the Anglicization of their title loosened Ngāti Tūwharetoa's control of the district. When the tourism potential of the district was fully appreciated and the government became involved in the development of that industry, their control was weakened further.

Once the Native Land Court had investigated the Taupōnuiatia block more land became available for settlement, and the Pākehā influence on the area increased. Unlike most of the rest of New Zealand, the lake itself was as valuable as Pākehā to the land, if not more so. Most land in the area was deficient in cobalt and unsuitable for grazing, but the potential of the lake as a sport fishery was recognized early. Trout were first introduced in 1885, but did not become established in significant numbers until the release of rainbow trout in 1903. They throve on the native fish in the lake and did enormous damage to kōkopu and kōura numbers and condition.[36] As the fishery grew in size and fame the government sought to regulate it, especially aspects such as access, and this necessitated control over the lake.

Although it was included within the boundaries of the Taupōnuiatia block, the Native Land Court had not investigated the ownership of the bed of the lake itself, nor was it included in

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[34] 'Papers Relating to the Census of the Maori Population, 1881' AJHR 1881 G-3, p.5. Research suggests that the population in the region of Lake Taupō fell during the contact period. Estimates by observers in the period 1838-1843 ranged from 1600 to 5000, while Walton estimates a population of 1100-1500 in 1849. The 1878 census, restricted to the immediate environs of the lake, recorded 805 persons. There was however some resistance to the survey. ibid. pp.24-25; 'Approximate Census of the Maori Population' AJHR 1874 G-7, pp.12-13; 'Papers Relating to the Census of the Maori Population, 1878' AJHR 1878 G-2, pp.6,24; Barbara Cooper, p.5,50-53,61; Walton, *passim*; R. Gerard Ward 'Maori Settlement in the Taupo Country 1830-1880' JPS 65 (1956): 41-44, p.43; Williams, p.210

[35] See pages 290-291 *infra*.

[36] Sir Maui Pomare, MHR for Western Māori, NZPD 211 (1926), p.289; Armstrong, p.92; Burstall 'Trout fishery', pp.120-121; Barbara Cooper, pp.110-113; Fletcher, p.264; Grace, pp.516-517

bordering land grants, which ended at the lake shore.[37] However, as much land bordering on the lake remained in Māori ownership, Taupō Māori largely controlled public access (and hence the fishing rights) to those parts of the lake shore and river banks most valued by trout fishers. Fearing that these lands might be leased or sold to foreigners, in the early 1920s the Crown stepped in to make an arrangement with Ngāti Tūwharetoa, purchase the fishing rights, and ensure public access to the lake shore and river banks. In return for the payment of £3000 per annum, plus half the annual licence fee revenue in excess of £3000 received by the government, Ngāti Tūwharetoa's fishing rights were to pass to the Crown. However, despite a number of earlier Native Land Court and general cases which had found that Māori continued to own large lakes where they had not been explicitly sold, the Crown refused to acknowledge Ngāti Tūwharetoa ownership of the lake bed. Ngāti Tūwharetoa continued to assert that they owned the lake and fishing rights (citing their Treaty of Waitangi rights), and that they did not wish to sell it.[38]

Nevertheless, the final settlement (as incorporated in the Native Land Amendment and Native Land Claims Adjustment Act 1926) included both the sale of the fishing rights and a clause vesting the lake bed in the Crown. In return for the general fishing rights, the right to fish for all indigenous fish in the lake was granted back exclusively to Māori (but not exclusively to Ngāti Tūwharetoa). The Tuwharetoa Maori Trust Board was set up under the same legislation to administer the funds received from the government. 1983 fishing regulations restricted the taking of kōura and indigenous fish to Ngāti Tūwharetoa, while in 1992 the bed of the lake was returned to Ngāti Tūwharetoa ownership by the Crown.[39]

Legislative protection applies also to Rotoaira, where trout were released by anglers. Once again this was against the wishes of the Ngāti Tūwharetoa owners, who had deliberately reserved Rotoaira from the sale of the Lake Taupō fishing rights. The kōaro and kōura resource

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[37] See pages 291-292 and note 47 *infra*.

[38] *Tamihana Korokai* v *The Solicitor-General* (1913) 32 NZLR 321; Native Land Amendment and Native Land Claims Adjustment Act, 1921-22, s.28; Native Land Amendment and Native Land Claims Adjustment Act, 1924, s.29; Lake Taupo Fishing Rights, Maori Affairs Dept. MA 13/23a and MA 13/23b, N.A.; Gordon Coates Native Minister and Prime Minister, NZPD 205 (1924), p.1047; NZPD 211 (1926), pp.285-286; Sir Maui Pomare, MHR for Western Māori, ibid. p.289; Sir Heaton Rhodes, Leader of the Legislative Council, ibid. pp.378-379; New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi Wellington: Law Commission, 1989, pp.76-79,167

[39] Lake Taupo Fishing Rights, MA 13/23a and MA 13/23b, N.A.; Rotoaira, 12/10/1955, Tokaanu MB 33 pp.221,224; Grace, pp.517-518; Mataitai, pp.76-79,167; Waitangi Tribunal Report of the Waitangi Tribunal on Lake Taupo Fishing Rights (Wai 18) Wellington: The Tribunal, 1989, pp.2-3

was completely destroyed, and in compensation the right of trout fishing in Rotoaira was reserved to Ngāti Tūwharetoa. Later provisions allowed the owners of the lake to charge others for permits to fish for trout. As a result local Māori have retained a high degree of control over the Rotoaira fishery.[40] Both Lake Taupō and Rotoaira have been affected also by hydroelectricity schemes in recent decades. Control gates on the Waikato mouth raised Lake Taupō's level slightly in 1941, and works at Rotoaira have also significantly altered the lake there since the early 1970s, submerging a number of lake-shore sites. This has also had a significant effect on traditional Māori fisheries in the Whanganui River.[41]

Ngāti Tūwharetoa control of Lake Taupō was eroded by the practical actions and policies of the Crown, such as the establishment of military posts and land purchases in the 1870s and 1880s, by the establishment of the trout fishery and its accompanying tourist industry in the early twentieth century, and by the Crown's taking over of the ownership and control of the lake in the 1920s. These policies were complemented and amplified by the work of the Native Land Court, which had a legal function in establishing the customary owners of Māori land and converting their title to one derived from the Crown. It also had a political function as the vanguard of settlement, making land available for purchase by settlers or the Crown, and weakening the corporate structures and functions of the tribe. While actual government policy was patchy in its application to such remote areas as Taupō, the Native Land Court affected everyone there, as there had been no pre-1865 land purchases or confiscations and so all land in the district was passed through the Court, most in a twenty year period from 1867 to 1887.

The Native Land Court held its first sitting in the Taupō district at Hōhepa Tamamutu's pā of Ōruanui (13 km north of present-day Taupō) in October 1867, with its accompanying land agents in tow, although initial purchase attempts were slow. The Court dealt with a number of cases in the area to the north of the lake, but the sittings were disrupted in 1869 when Te Kooti arrived in the area. The lake fisheries were not considered in great detail in these initial

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[40] Sir Maui Pomare, MHR for Western Māori, NZPD 211 (1926), p.289; Native Purposes Act, 1938, s.22; Maori Purposes Act, 1959, ss.3-8; Lake Rotoaira Fishing Rights, Marine Dept. M 1/7/132; John Atirau Asher, Rotoaira, 10/3/1947, Tokaanu MB 28 p.265; Mataitai, p.78; G.H. Scholefield Taupo Haurau: Incidents of a Tribe [Wellington]: Harry H. Tombs, [1944], p.11

[41] Rotoaira, 12/10/1955, Tokaanu MB 33 pp.220-224; Barbara Cooper, pp.121-123; Mary Newman, p.4; Raymond, p.20; C. Strachan and P. Crawford 'The Tongariro Power Development Scheme and Water and Land Use' in Forsyth and Howard-Williams, pp.31-34. See also page 352 *infra*.

cases, which mainly concerned large blocks to the north and north-east of the lake with comparatively small lake frontages. Ownership of a kōkopu fishery in the lake was disputed in the Ōruanui case, but this was not referred to in Judge Monro's decision. There were applications made in 1872 for the investigation of title to the Kōkoputaua fishing ground and Motutāiko, an island in the lake, but these were dismissed by Judge Rogan, apparently because of a lack of a survey.[42]

The effects of Pākehā activity in the *Rohe Pōtae* encouraged Ngāti Tūwharetoa and neighbouring King Country iwi to petition the Government in 1883. They sought protection from land speculators and guarantees of their rights of self-administration over their lands. The Government's response was the Native Land Alienation Restriction Act, 1884, which re-imposed Crown pre-emption in the *Rohe Pōtae*.[43] In late 1885 Te Heuheu Tūkino Horonuku, acting on behalf of Ngāti Tūwharetoa, put in a claim to the Native Land Court for the Taupōnuiatia Block. This extended over 2½ million acres, centred on Lake Taupō, and corresponded largely with the Ngāti Tūwharetoa tribal *rohe*. Some of the land within Taupōnuiatia, especially to the north of the lake, had already been passed through the Court and sold or leased, but the object of submitting the whole area as one block was to reduce costs and delay, and to retain control over the land. This was to be achieved through limiting the effects of the Court process, such as the temptations caused by land speculators offering credit and the indebtedness caused by the costs of long hearings; these problems had been raised in the 1883 petition.[44]

Hearings began in January 1886, with the claim based on descent from the ancestors Tia and Tūwharetoa, and occupation. The initial Taupōnuiatia hearing was very brief, and was confined to the establishment of boundaries, the naming of the key ancestors, and the setting out of the basic heads of the claim — ancestry, occupation, conquest, mana, and gift. During this initial case, a list of 141 hapū that would be accepted as claimants on the block was given to the Court by Te Heuheu. The list included some who were not descended from Tia and Tūwharetoa, but the Tūwharetoa ancestors were the only ones put forward as *pūtake*. This emphasis on Tia

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[42] See pages 304-306,310 *infra*; Judgment, Oruanui, 14/4/1868, MB 1 pp.88-89; Omaunu, 17/3/1869, TMB 1 p.213; Kokoputaua, 29/3/1872, TMB 1 p.225; Motutaiko, ibid. p.232; Barbara Cooper, pp.15,34-36; Pouakani Report, pp.56,63,67

[43] 'Further Reports from Land Purchase Officers' AJHR 1875 C-4A, p.4; 'Petition of the Maniapoto, Raukawa, Tuwharetoa and Whanganui Tribes' AJHR 1883 J-1; Barbara Cooper, pp.53,61,69; Pouakani Report, pp.68-71,95-98,111-112,230-238

[44] 'Petition of the Maniapoto, Raukawa, Tuwharetoa and Whanganui Tribes'

and Tūwharetoa as the *pūtake* of Ngāti Tūwharetoa's occupation rights in Taupō must have influenced the evidence of witnesses in all the cases under the Taupōnuiatia umbrella, masking the importance of other ancestors who also had rights over the land.[45] Once the framework for claims was established, the block was divided into a number of subdivisions which were heard separately, but always within the parameters already prescribed by Te Heuheu. All the cases were heard by former local military officer Judge David Scannell, sometimes with the assistance of Judge Brookfield.

Judgment was passed in September 1887, with title to 151 subdivisions totalling over a million acres in area having been granted to Ngāti Tūwharetoa, and only a handful of subdivisions were left uninvestigated. A great many of the Taupōnuiatia subdivisions were practically uncontested, with cases seeming to have been decided on by Māori beforehand and simply brought to the Court for ratification; the evidence in some cases related solely to the fine-tuning of boundaries and lists of owners. Other subdivisions had already been investigated, and so only a relatively small proportion were the subject of detailed investigations. Many of these were to the west, where hapū related more closely to Ngāti Raukawa argued their cases strongly against their Ngāti Tūwharetoa relatives; to the south, where there were tensions between rival hapū groupings; and to the north-east, where the subdivision of some blocks previously investigated under the ten-owner provisions of the Native Lands Act 1865 was closely contested.[46]

While many of these Taupōnuiatia subdivisions had considerable lake frontages and much evidence was given regarding fisheries in the lake, Judge Scannell did not give any indication of his general views on Māori fishing rights in his judgments. This may have been

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[45] This issue resurfaced in 1888, when Ngāti Maniapoto and the Ngāti Tūwharetoa-Ngāti Raukawa chiefs Hitiri Te Paerata and Te Papanui Tamahiki petitioned Parliament, unhappy with the way Te Heuheu's section of Ngāti Tūwharetoa had established the western boundary and decided upon the acceptable ancestors at the very beginning of the hearing. At that time Hitiri Te Paerata and Taonui Hikaka of Ngāti Maniapoto were still absent at a Court sitting elsewhere. They believed that rightful Ngāti Maniapoto and Ngāti Raukawa owners had been excluded as a result. Their complaints were investigated by a Royal Commission, but its findings had little implication for the lake itself. 'Native Affairs Committee: Report on the Petitions of Hitiri Te Paerata and others, together with Minutes of Evidence' AJHR 1888 I-3D; 'Report of the Royal Commission Appointed to Inquire into Certain Matters Connected with the Hearing of the Tauponuiatia Block' AJHR 1889 G-7; Pouakani Report, pp.124-130,243

[46] Tauponuiatia, 16/1/1886, TMB 4 pp.37-42; Judgment, Tauponuiatia West, 12/3/1886, TMB 4 p.352; Judgment, Tauponuiatia, 24/9/1887, TMB 9 p.274 ff.; Grace, pp.497-498; Pouakani Report, pp.115-124,230-238. J.B. Jack, representative of a number of claimants to Rotoaira in the 1940s and 1950s, told the Native Land Court then that, "My people take the view that the 1886 decisions and hearings were the most important events that have taken place so far as Tuwharetoa is concerned since the pakehas came to New Zealand." 18/2/1954, Tokaanu MB 31 p.26. See pages 99-100 *supra*.

influenced by the fact that block boundaries ran along the lake shore, and not out into the waters;[47] but generally where there were offshore fisheries associated with the occupation of a block, these fisheries were discussed in evidence. Scannell did find that one claimant had obtained an "interest through permissive occupation" through his use of kōkopu fisheries on the Rangatira block without a firm *take*, but he did not connect this with the act of fishing *per se*. In the case which dealt in most detail with lake fisheries, the Tauhara Middle subdivision, Scannell barely discussed fisheries issues, speaking only in generalities about circumstantial evidence of occupation even where this evidence had concentrated overwhelmingly on the use of fisheries.[48] More relative interests and subdivision cases heard by Scannell in the late 1890s dealt with fisheries, but again his judgments did not comment on fishing rights. The failure of Scannell and others to discuss fishing rights in Native Land Court judgments is in sharp contrast to the wealth of evidence given by people in the Court concerning their rights to the blocks under investigation and the fisheries of those areas.

Derivation of rights in the Taupō fishery

The evidence presented in the Taupō Native Land Court records suggested that most property rights, fishing included, were exercised through ancestral *take* and passed down the generations. People in the Court routinely based their claims to land and fisheries on their belonging to hapū that were generally recognized as 'owners' of the land, and on descent from early ancestors who had an acknowledged right on the land. However, a number of situations were presented to the Court which demonstrated how fishing and other resource gathering activities could be undertaken through some other connection to the resource. Examples of these alternatives to *take tupuna* include fishing through the right of a spouse, or acquisition of a right through one's own endeavours. While these examples do occur, the Taupō Court records contain

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[47] *e.g.* Te Heuheu Tukino, Tauponuiatia West, 24/2/1886, TMB 4 p.247; Taniora Te Tahuri, Pukawa, 22/3/1886, TMB 5 pp.28-29; Hori Te Tauri, Tauranga No. 2, 2/4/1886, TMB 5 p.127; Te Papanui Tamahiki, Waihaha, 9/2/1887, TMB 7 p.11; Patena Kerehi, Hauhungaroa Karangahape, 21/2/1887, TMB 7 pp.79-80; Keepa Te Puataata, Te Hautu, 30/3/1887, TMB 7 p.345. Blocks investigated earlier seem also to have been bounded by the lake shore, *e.g.* Tauhara, 16/3/1869, TMB 1 p.205.

[48] Judgment, Rangatira, 22/2/1886, TMB 4 p.237 (see page 297 *infra*); Judgment, Tauhara Middle Subdivision, 29/5/1886, TMB 6 pp.74-80 (see page 299 note 69 *infra*).

fewer examples of how fishing rights were actually established and transmitted than those of many other areas.

Hapū claims to fisheries or other resource areas and land were frequently made on the grounds of a continuous exercise of rights from earlier times. Hapū rights were routinely claimed over large areas by descent from a number of prominent ancestors (*take tupuna*), usually starting with Tia or Tūwharetoa. However, although many cases were based on descent from these two, who were the key ancestors put forward in the Taupōnuiatia case, fisheries were not actually mentioned in the initial statement of case for Taupōnuiatia. To the west of the lake, rights were commonly traced from Tia, Tūwharetoa, Parekāwa, and her children.[49] In some cases rights to particular fisheries within a block were traced back to 'time immemorial', no specific ancestor being put forward. In other cases, fishery resources were claimed by descent from named early ancestors.

When Eru Poihipi described the resources exploited by his four hapū on the Rangatira block, he added that, "We have always fished on shores of lake". In this hearing (one of the first Taupōnuiatia subdivisions to be heard) he appeared successfully on behalf of the Ngāti Aokarere, Ngāti Rauhoto, Ngāti Ohomairangi and Ngāti Te Urunga hapū. The four ancestors after whom the hapū were named were all closely related and lived at much the same time approximately seven generations previously. These hapū were claiming the bulk of the 10 500 acre block. Eru gave no specific ancestor from whom the fishery was claimed, saying that his own rights were derived from the four hapū. He did however trace the right to the land as a whole from the four ancestors, and the mana over the land from the ancestor Ohomairangi, which suggests that Eru meant that the fishing rights were at least as old as the four ancestors when he said that the four hapū had "always fished" there.[50]

Other people in other cases gave examples of fisheries used since an undefined early time, often as evidence of the rights of their hapū or themselves on the land. These mentions of early fisheries were usually included in the list of the various occupation sites and resources on the land given at the start of many peoples' evidence.[51] Wī Maihi Maniapoto spoke of a fishing

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[49] Hitiri Te Paerata, Tauponuiatia West, 8/3/1886, TMB 4 pp.320-322; Te Papanui Tamahiki, Waihaha, 9/2/1887, TMB 7 pp.10-11

[50] Eru Poihipi, Rangatira, 15/2/1886, TMB 4 pp.186-189,193-196

[51] *e.g.* Hori Te Tauri, Tauranga No. 2, 2/4/1886, TMB 5 p.128

village at Wharewaka used "from a very early period down to the present time", as distinct from other cultivations on the block which were only worked in the previous few generations. Elsewhere on the block, at Waipāhīhī, he spoke of inanga being taken "from time immemorial to the present" by his four hapū, Ngāti Hineure, Ngāti Tūtetawhā, Ngāti Tūtemahuta and Ngāti Te Urunga.[52]

There were also occasions on which fishing rights were claimed by descent from particular early ancestors. On the Hautū block, counter-claimant Hōri Te Tauri (of Ngāti Tuhinaroto, Ngāti Iwikinakia, and Ngāti Te Karihi) traced his right to Te Hautū fishing village and an area used for the manufacture of fishing equipment from the ancestor Te Iwikinakia, son of the Ngāti Tūwharetoa migrant ancestor Waikari. He also added that it was Tūrangitukua, the contemporary of these ancestors, who had brought the skill of making *hīnaki* from the coast to Hautū, where it was previously unknown.[53]

When individuals claimed fishing rights in the Court (be that for themselves or on behalf of their immediate families), they very often made it clear in their evidence that such rights came down to them from their ancestors. The ancestor mentioned was usually a parent or grandparent who had used the resource previously, with an implied or stated ancestral right going back further from them. It was common for people to claim a right to fish and cultivate in a named area, rather than to confine their claim to the exploitation of one particular resource.[54] Hitiri Te Paerata claimed a number of fishing grounds at Waihaha for Kauiora Te Kohera's children, saying:

> These were ancestral Kokopu grounds passed from his ancestors to Hautuku and from him to Kawira father of those children. Down from Ngaherehere to Kawiora they had great right the evidence being permanent occupation from the ancestral times — on both sides.[55]

Ngaherehere was Te Hautuku's maternal great-grandfather, and Ngaherehere's brother Tarakaiahi (Te Hautuku's paternal grandfather) was also put forward as the source of an "ancestral

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[52] Wi Maihi Maniapoto, Tauhara Middle Subdivision, 21/5/1886, SMB 4 pp.38-39. See also parallel text at TMB 6 pp.31-32

[53] Hori Te Tauri, 26/4/1887, TMB 8 pp.149-153

[54] Hitiri Te Paerata, Oruanui 11/4/1868, TMB 1 p.54; Te Waka Te Maire, Wairakei Rehearing, 24/1/1882, TMB 2 p.270; Te Papanui Tamahiki, Tuhua Hurakia Waihaha, 14/2/1887, SMB 4 p.312; Raukahawai Maraenui, Waihaha Names, 14/5/1887, SMB 2 p.10; Takiura Te Momo, ibid. 19/5/1887, TMB 8 p.262; Hitiri Te Paerata, Waihaha No. 3, 6/5/1897, TMB 11 pp.301,305

[55] Hitiri Te Paerata, Waihaha No. 3, 7/5/1897, TMB 11 pp.301,305,308

take". In the Ōruanui subdivision case, Henare Poihipi put forward a more general and immediate claim through ancestry in saying that, "I got my claim through my mother", insisting that a woman's children could claim rights from her.[56]

Some of those claiming rights to land in the Court could give evidence of formal arrangements concerning the land, such as bequests, to demonstrate their ancestral rights. The chief Hōhepa Tamamutu appeared on behalf of Ngāti Te Rangiita as claimant in the Ōruanui block, but also had a right to part of the block himself. He told the Court:

> When I was quite a child my uncle Te Wharengaro having no children wished to leave his land to me and gave me a description of the boundaries which according to him commenced at Mahauroa.... He took me along the boundaries of the land.[57]

The land so bequeathed included a stretch of the lake shore in an area where there were a number of kōkopu fishing sites. Other instances were given where earlier ancestors had deliberately given lands to their children, or divided their lands amongst them.[58]

The acquisition or development of a resource by an ancestor often lay at the root of an ancestral *take*. At Taupō, Ngāti Tūwharetoa called upon the actions of Ngātoroirangi, who had created the fish in the lake and cast his great spear Kuwha into the waters, to demonstrate their rights to the lake.[59] The development of a particular fishery, either by a hapū ancestor or in more recent times, was sometimes presented to the Court as evidence of possession of a right to that fishery. The example of Tūrangitukua bringing the art of *hīnaki*-making to Hautū has already been cited, and it was from him that the right to the fishery was traced:

> Before Iwi Kinakia's time they didn't know how to make fishing Baskets — when Turangitukua came from the coast where he was born, he showed the people how to make them & from that time they used them in the Waikato River, and continued to do so, at the part called Tongariro.[60]

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[56] Henare Poihipi, 4/6/1886, SMB 4 p.92

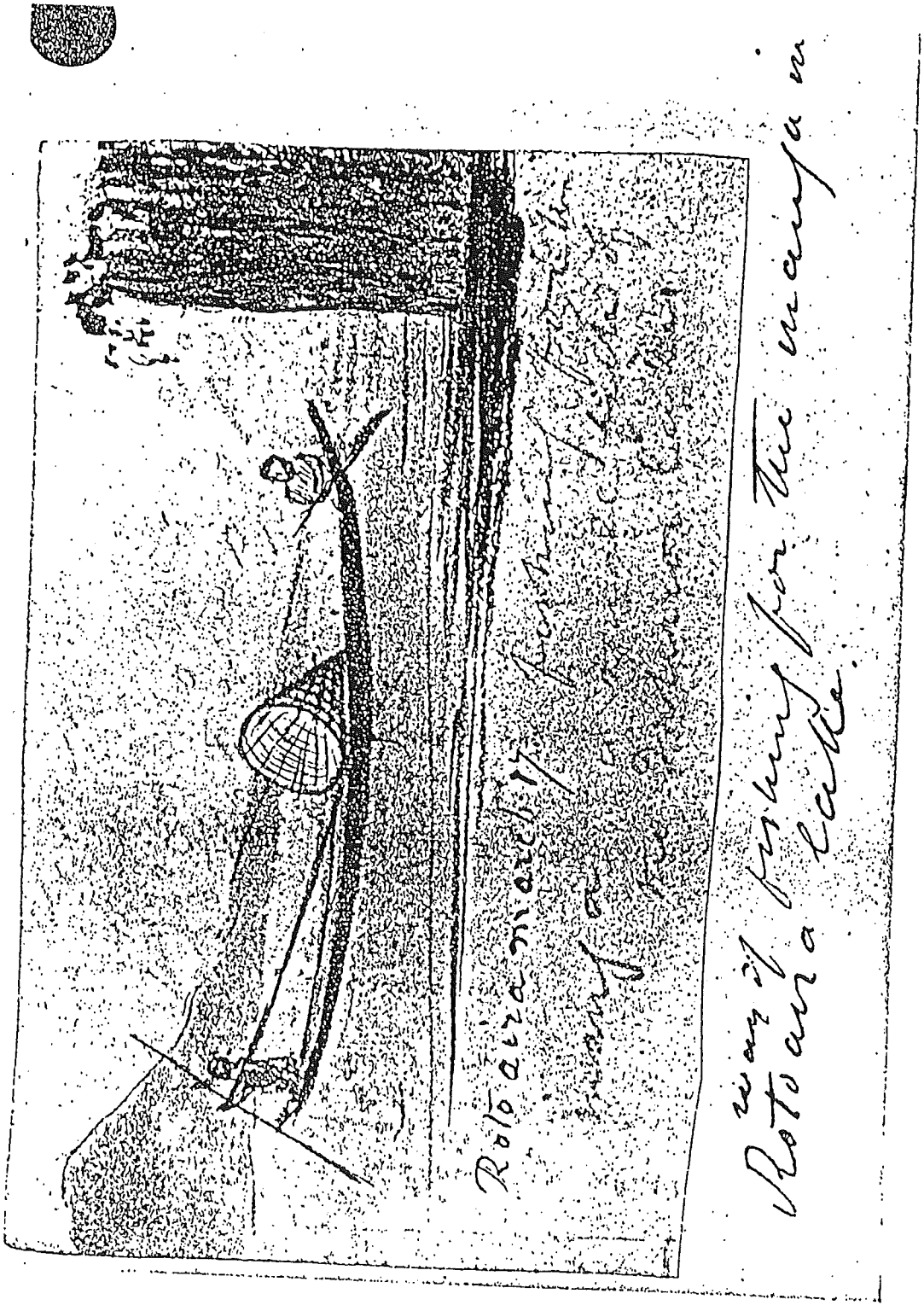
[57] Hohepa Tamamutu, 11/4/1868, TMB 1 pp.60-61

[58] Te Oti Te Puke, Tauhara Middle Subdivision, 21/5/1886, TMB 6 p.17; Te Rangitahau, ibid. 26/5/1886, p.55. See also page 282 *supra* concerning the divisions amongst Te Rangiita's immediate descendants.

[59] See page 280 *supra*.

[60] Hori Te Tauri, Hautu, 26/4/1887, TMB 8 p.151

Fig. 5 **Richard Taylor: Way for fishing for the inanga in Rotoaira lake, c. 1848**
This sketch from Rev. Richard Taylor's journal shows a large scoop net in the canoe.
Courtesy of the Alexander Turnbull Library, Wellington, New Zealand, ref. F 50522½



In the Waihaha case, an off-shore kōkopu fishing ground called Te Tahewa was said to belong to Te Hautuku, grandfather of some of the proposed grantees. Te Hautuku's right to Te Tahewa came about because it had been found by his slave Ngahou. A kōkopu fishery on the Horomatangi Reef was restricted to the descendants of Kopeke, who had first found and utilized the area in around the early seventeenth century. The exclusive right of his descendants to use that fishery was enshrined in a local *whakatauākī*.[61]

Fishing or other resource rights could be derived from sources or *take* other than *take tupuna* and *ahi kā*, or ancestry and ongoing occupation. In Taupō, the reasons given for the acquisition of a resource included invitation onto the land by a previous occupant, or tacit approval resulting from failure to eject any group which had lived and worked on the land over an appreciable length of time. Unlike other regions, there were no examples given to the Native Land Court in Taupō of specific fishing resources being acquired from a previous occupant by the use of force.

In the Rangatira case Judges Brookfield and Scannell rejected the case put up by Ngāti Te Rangihiroa as a whole on the block because of contradictory evidence given by the different people in their party and insufficient evidence of ancestral rights through occupation, but they decided that certain members of that hapū had established a right by what they described as "permissive occupation". One of the persons found so entitled, Taiere Koauau, had said in his evidence that he had caught kōkopu at places on the block as well as cultivating.[62]

Some relied on a formal invitation as the basis of their rights. Natana Pipito, of the Ngāti Kiri hapū which was among the successful claimants for the Waihaha block, was opposed as a grantee and had to return to the Court to prove his personal interest. He claimed on grounds of residence and cultivation at Te Papa, on the lake shore. In his evidence, he said that Te Papa had been unoccupied, and had then been given to him and his people to cultivate by Tini Waata and Hauraki (prominent chiefs in the area). He admitted that they had gone there in part for safety, but added that, "It was not that I had any right at Te Papa and Mohipotaka that I went

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[61] Hitiri Te Paerata, Waihaha No. 3, 7/5/1897, TMB 11 p.304; Fletcher, p.261. Fletcher gave simply a paraphrase of the *whakatauākī*, not the original Māori version.

[62] Rangatira Judgment, 22/2/1886, TMB 4 pp.232-237; Taiere Koauau, ibid. 13/2/1886, pp.179-180

there — but I was connected with those who had a right." In an earlier case, Te Papa had been described as a fishing place of Hauraki and others, of Ngāti Parekāwa and Ngāti Te Kohera.[63]

On the other hand, some claimed rights which were disputed by opposing parties on the grounds that the claimant only came onto the land through invitation. In these cases, those who had conferred the invitation, or their descendants, did not regard this as sufficient to establish the sort of permanent right which would justify inclusion in a Crown-derived title. Ngāti Tama argued that earlier hapū leaders Para and Ngako had sheltered Hōhepa Tamamutu's Ngāti Te Rangiita people at Whakaipo when they were driven off their own lands by Ngāti Parekāwa. Hōhepa argued in turn that in the time of his great-grandfather Te Kamo, "Para and Te Ngako left Taupo giving up entire possession of the land to [Te Kamo]." The Court found for Hōhepa, ruling that Ngāti Tama had been driven out.[64]

Most Taupō people distinguished between ancestral usage or 'ownership' rights, and those exercised through some sort of relationship with the 'owners'. In the Waiaruhe hearing, it was claimed that Henare Te Poihipi of Ngāti Ruingaarangi only participated in growing food on the block because he was married to the sister of Tarakainga of Ngāti Te Ao, who had a major interest in the land.[65] On the adjoining Omaunu block, Hōhepa Tamamutu of Ngāti Kurapoto and Ngāti Kapawa informed the Court that: "The food growing at Wetanui was planted by my permission, and was given to my relative Waitawa, married to a man of Ngatirauhoto. She asked my permission."[66] Ngāti Rauhoto were the claimants for the Hiruhārama Rangatira block, of which Omaunu had originally been a part, so it is possible that Hōhepa was attempting to strengthen his own case by demonstrating that the Ngāti Rauhoto man was cultivating through his wife's right rather than his own.

The rights of the hapū ancestor Tarakaiahi in the region of Waihaha were also subject to a similar sort of debate. Hitiri Te Paerata, of Ngāti Te Kohera and other hapū, believed that

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[63] Hitiri Te Paerata, Tauponuiatia West, 2/3/1886, TMB 4 p.285; ibid. 9/3/1886, p.333; Natana Pipito, Waihaha Names, 6/6/1887, SMB 2 pp.81-84

[64] Irikei Te Rangitianui, Oruanui, 8/4/1868, TMB 1 pp.33-34; Hipirini Te Whetu, ibid. p.35; Hohepa Tamamutu, ibid. 9/4/1868 pp.39-40; Judgment, ibid. 16/4/1868, pp.88-89

[65] Reweti Te Kume, 17/3/1869, TMB 1 p.208; Hohepa Tamamutu, ibid. p.209

[66] Hohepa Tamamutu, 17/3/1869, TMB 1 p.212

Tarakaiahi's rights in the Umurua area were obtained from his wife Ruawhango's people Ngāti Moekino:

> Umurua was given to Ruawhango and her husband as a residence — I don't know who gave it perhaps N' Moekino — Tarakaiahi has an interest personally in No. 2 Block at Umurua & Te Whakau — the right descended to people to whom his wife belonged to.[67]

This land was given to the couple on their marriage, and so returned to Ngāti Moekino when the couple had no children. Under those circumstances Tarakaiahi's descendants by other wives had no rights on that land. On the Ngāti Tarakaiahi side, Te Papanui Tamahiki claimed the Waihaha block from the hapū ancestor, saying, "Tarakaiahi went to live there through his fathers mana — his title to land he got from his wives — his fathers mana was over men", and he said elsewhere that Tarakaiahi had got his interest through marriage.[68] Ngāti Tarakaiahi were judged by the Court to have established sufficient rights to be included in the title, presumably through those occupation rights derived through Tarakaiahi's marriages.

The dispute over fishing rights at Waipāhīhī revolved around a social rather than kin relationship.[69] When the Tauhara Middle block came to be subdivided, Ihakara Kahuao of Ngāti Hinerau and Ngāti Rauhoto, an original grantee of the land, claimed a number of fishing grounds in the lake, including Waipāhīhī. These same fisheries were also claimed by Ngāti Hineure, Ngāti Tūtetawhā, Ngāti Tūtemahuta and Ngāti Te Urunga. Their representative Wī Maihi Maniapoto rejected Ihakara's claims, saying Ihakara had never actually lived at Waipāhīhī, and, "During my time none of Ihakara's people ever came there [Waipāhīhī] to occupy or take Inanga they came if at all as visitors, and returned after a very short stay as visitors to their own

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[67] Hitiri Te Paerata, Tauponuiatia West, 9/3/1886, TMB 4 p.330; see also Tini Waata, ibid. 10/3/1886, p.338

[68] Te Papanui Tamahiki, Waihaha, 18/2/1887, TMB 7 p.72; Waihaha No. 3, 8/5/1897, TMB 11 p.324; Judgment (Judge Scannell), Waihaha, 22/2/1887, TMB 7 pp.89-90

[69] Waipāhīhī was part of the Tauhara Middle block of 100 000 acres, which had been granted in 1869 but which was now to be subdivided as part of the general Taupōnuiatia hearing, at the wish of the bulk of the grantees. There were six original grantees, each representing a hapū. One of these, Ihakara Kahuao, was included as a representative of Ngāti Hinerau. When the subdivision hearing started, the descendants of the other grantees from the closely-related Ngāti Hineure, Ngāti Tūtetawhā, Ngāti Tūtemahuta and Ngāti Te Urunga hapū disputed the extent of Ihakara's customary rights on the block. They believed that he had been included in the original title because of his status in the community as the local Native Sergeant, and that his ancestral rights were on the other side of Tapuaeharuru Bay. Most of the evidence given by Ihakara's party to justify their inclusion in the original grant referred to their alleged ancestral rights to live at the lake shore and use the fisheries adjoining the lake frontage of the block, and so the rebuttal of the four hapū revolved mostly around fishing rights. As a result a wealth of evidence regarding many aspects of fishing rights was given in this case. Judge Scannell agreed that Ihakara had been included only because of his position in the community, and gave him only a very small portion. Judgment, Tauhara Middle Subdivision, 29/5/1886, TMB 6 pp.78-80

Kainga." He did however go on to say that sometimes Ngāti Hinerau and Ngāti Rauhoto came onto the land to live with them, and sometimes he and his hapū went to Rangatira to stay with Ngāti Hinerau and Ngāti Rauhoto.[70] Nevertheless he rejected these sorts of cordial exchanges as a basis for claiming a proprietorial fishing right.

Hapū, whānau and personal fishing rights

The commonest form of fishing right in the Taupō area, so far as the Native Land Court was concerned, was the hapū fishing right exercised by virtue of an ancestral title or *take tupuna*. Other resources were also claimed and used by smaller whānau groups and even individuals. However, while the existence of these gradations in the scale of resource rights is clear from evidence given in the Court, people did not often analyse these distinctions themselves. In some cases usage rights over resources were also attributed to groups which were not defined in kinship terms by people in the Court but on closer examination most of these groups clearly had some sort of kin relationship. The evidence throughout highlights the fluidity in traditional Māori kinship arrangements, with hapū and whānau rights in particular being difficult to distinguish from each other. There was no clear line between small hapū and large whānau. Some groups comprising only three or four generations and maybe two or three households, which would be described as whānau under the conventional model, called themselves by hapū names; and groups of similar size were almost always considered part of one or more larger hapū. Most small hapū and whānau shared similar sorts of resource rights, distinguishable from the rights of both larger hapū and single households, and this intermediate stage should be kept in mind when discussing the nature of 'hapū' rights.[71]

In Taupō, when claims to large bodies of water or blocks of land containing fisheries were being discussed, occupation and 'ownership' of resources was always couched in terms of the hapū. During the negotiations for the sale of the fishing rights in the lake, a number of Ngāti Tūwharetoa hapū petitioned the Native Minister:

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[70] Wi Maihi Maniapoto, Tauhara Middle Subdivision, 22/5/1886, SMB 4 p.39, TMB 6 p.32; 25/5/1886, TMB 6 p.53; Te Oti Te Puke, ibid. 19/5/1886, TMB 5 p.402, SMB 4 pp.18-19, 20/5/1886, TMB 6 p.5

[71] See pages 17-18,114-115 *supra*.

> [T]here are at least nine tribes who occupied the Fishing grounds from Te Hatepe to Tapuaeharuru and thence westward to the shores of Waihaha, and there are also several subtribes who would be certain to contest for rights on these fishing grounds.[72]

Likewise, when the Land Court investigated Rotoaira in 1937-56, the numerous different hapū with interests in the surrounding blocks were found to be owners.[73]

In the nineteenth century Land Court cases general claims were also usually made in the name of hapū. When case conductors and major witnesses began their evidence, they gave a précis of hapū interests on the land, including loosely-defined fishing interests. These précis typically took much the same form. The 10 500 acre Rangatira block was claimed by Ngāti Te Aokarere, Ngāti Rauhoto, Ngāti Ohomairangi, and Ngāti Te Urunga. One of their party, Eru Poihipi, named a list of settlements, cultivations, landing places, burial sites, and fern root spots. To this he added, "We have always fished on [the] shores of [the] lake and have had exclusive right never having been disturbed."[74] To the south of the lake, Keepa Te Puataata put forward a claim to the various subdivisions of the 104 000 acre Te Hautū block on behalf of a large number of Ngāti Tūwharetoa hapū, some of which had smaller composite "sub-hapū" listed with them. This claim was based on ancestry and occupation through Tūwharetoa. Keepa also listed the "signs of occupation" in his initial statement: "Kaingas, plantations, burial grounds, bird catching places, rat catching places. Fishing places — cattle &c. running over it."[75]

Within the overall claim to the Court, hapū were often associated with general fishing areas, such as a beach, a stream, or a fishing village. Fishing sites which were associated with particular hapū were found all around the lake. At Wakaroa beach, there was a dispute between Ngāti Te Rangiita and Ngāti Te Kohera over which had the rightful use of the fishery. While the names of the individuals (all prominent people of those hapū) who used the fishery were mentioned by people on both sides, it was clearly regarded as a fishery belonging to a hapū.[76] The fisheries and fishing village at Wharewaka were claimed by Ihakara Kahuao's hapū Ngāti

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[72] Petition of several hapu of Ngati Tuwharetoa, Taupo, 15/4/1925, to Native Minister, MA 13/23b, NA. See also Williams, p.77

[73] Rotoaira, 18/2/1954, Tokaanu MB 31 pp.14ff.; John Koning Lake Rotoaira: Maori ownership and Crown policy towards electricity generation 1964-1972 Wellington: Department of Justice Waitangi Tribunal Division, 1993, pp.1,4

[74] Eru Poihipi, 15/2/1886, TMB 4 pp.186-189. See page 293 *supra.*

[75] Keepa Te Puataata, 30/3/1887, TMB 7 pp.345-347

[76] Hohepa Tamamutu, Oruanui, 11/4/1868, TMB 1 pp.56-57; Perenara Tamahiki, ibid. p.59

Hinerau and Ngāti Rauhoto on one side, and Ngāti Tūtetawhā, Ngāti Tūtemahuta, Ngāti Hineure and Ngāti Te Urunga on the other. Once again individuals were named but always within the hapū title.[77] Other beaches in the Tauhara Middle block were subject to the same debate.

Hapū fisheries also existed in streams and other small bodies of water around the lake. On the Tauhara Middle block, the four hapū mentioned above talked about fishing for kōkopu in the Kahikatea stream, inland of the lake, as well as the numerous lake fisheries.[78] Eruera Ohomairangi of Ngāti Karetoto said that his hapū "used to catch kouras" at the Rau o te Huia and Mokonuiarangi streams, which feed the Waikato near the Huka Falls, and his hapū also claimed the kōkopu fishery in various streams in the same area.[79] To the west of the lake, Ngāti Kiri and Ngāti Tarakaiahi listed the "small swampy lake" of Wharehe and its kōura fishery amongst their resources.[80]

Hapū also put forward claims to particular fishing sites, as opposed to general fishing areas. In the lake, these often took the form of distinct named fishing grounds included under the umbrella name of the beach or locality. The tributary waterways might contain a number of weirs or other separate sites. The *pā hīnaki* Tapuaeharuru, found at the location of the same name where the Waikato flows out of Lake Taupō, was claimed by both of the rival hapū Ngāti Te Urunga and Ngāti Te Rangihiroa.[81] Within the deep-water fishing ground off Waitahanui, Ngāti Hinerau and Ngāti Rauhoto claimant Te Oti Te Puke named Tutaiwata, Te Hungahunga, Te Koko, Te Angatu and Maketu as the separate fisheries used by his hapū. He also mentioned other sites which included more than one fishing ground.[82]

To the west, the area known as Te Papa extended from the lake-shore pā of that name inland along the Oruapuraho stream. It was claimed variously by Ngāti Parekāwa, its composite hapū Ngāti Te Kohera, and its composite hapū Ngāti Tarakaiahi. Te Papanui Tamahiki told the

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[77] Te Oti Te Puke, Tauhara Middle Subdivision, 19/5/1886, TMB 5 pp.402-403; SMB 4 p.19; TMB 6 p.5, SMB 4 pp.22-23; Wi Maihi Maniapoto, ibid. 22/5/1886, TMB 6 pp.31,33, SMB 4 pp.38-39. See page 299 note 69 *supra*.

[78] Wi Maihi Maniapoto, Tauhara Middle Subdivision, 21/5/1886, TMB 6 p.27, SMB 4 p.35

[79] Eruera Ohomairangi, Oruanui, 14/4/1868, TMB 1 pp.69-70; Poihipi Tukairangi, Wairakei, 31/5/1881, TMB 2 p.223

[80] Petera Tamahiki, Waihaha Names, 25/5/1887, TMB 8 p.291, SMB 2 p.40

[81] Taiere Koauau, Rangatira, 13/2/1886, TMB 4 p.179; Eru Poihipi, ibid. 15/2/1886, pp.187,198

[82] Tauhara Middle Subdivision, 19/5/1886, TMB 5 pp.400,402; 20/5/1886 TMB 6 p.5, SMB 4 pp.17,23

Court: "They [Ngāti Tarakaiahi] used to catch fish at Te Papa, the nets were put down at Te Huiau and Manukapiko and Te Iwituaroa. All these belonged to my grandfather, Whakatohe, and the N. Tarakaiahi have it in possession today."[83]

This example demonstrates how difficult it can be to determine from the Land Court records whether a right was exercised by a hapū, or a whānau operating under a hapū overright. What is defined in Court in terms of a hapū right often turns out on closer examination to have been exercised by the members of a whānau.[84] Ngāti Tarakaiahi were a small hapū, Tarakaiahi being Te Papanui Tamahiki's great-grandfather. Papanui had also associated the fisheries he named with a "plantation" worked by his father at Te Papa. While the general Te Papa area was attributed to the larger hapū group, be that Ngāti Te Kohera or Ngāti Parekāwa, the fisheries themselves were associated with the claimant's father and grandfather, in the name of his great-grandfather. This example may represent a small hapū right exercised under the overright of the larger hapū, or the transition from a whānau to a hapū right; or alternatively it may indicate that people were aware of the preference of the Native Land Court for claims presented in the name of the hapū. Any way, it shows that sharp distinctions between fishing rights as exercised by hapū and as exercised by whānau cannot always be drawn.

Other examples demonstrate the difficulty in attempting to sharply delineate hapū interests from whānau interests. The Kaitaha fishery was included in Ārama Karaka's Tauhara Middle claim on behalf of his aged father-in-law Ihakara Kahuao and Ihakara's hapū Ngāti Hinerau and Ngāti Rauhoto. When discussing the fishery, Ārama spoke in terms of 'we' — "we occupied", "we used to catch fish". Describing Ihakara's connection with the fishery, he said, "He and his people still continue to fish there in the proper season." The transcript in the judge's minute book reads 'hapu' for 'people', suggesting that this was the word used by Ārama,[85] but

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[83] Te Papanui Tamahiki, Tuhua Hurakia Waihaha, 14/2/1887, SMB 4 p.312; Hitiri Te Paerata, Tauponuiatia West, 2/3/1886, TMB 4 p.285; Hauraki Tonganui, Waihaha Names, 10/3/1887, TMB 7 p.202; Te Papanui Tamahiki, ibid. 26/5/1887, TMB 8 p.302, SMB 2 p.49

[84] Some of these difficulties are due to imprecision and variation in the English translation of terms used by Māori-speaking witnesses. An example of the confusion which can be caused by the process of translation is W.J. Phillipps' description of the kōaro fisheries in Rotoaira — "Various families claim the right to use certain springs, and have done so for many hundreds of years." (Phillipps The Fishes of New Zealand, p.37). It is unlikely that a strictly whānau right would be transmitted over a number of centuries (except perhaps in the case of certain chiefly lines), whereas a hapū right was more likely to survive for this period. This use of 'family' to mean 'hapū' (in contrast to iwi/tribe) was not uncommon in the nineteenth and early twentieth centuries. See pages 67-68 *supra*.

[85] Tauhara Middle Subdivision, 17/5/1886, TMB 5 pp.378-379, 385, SMB 4 pp.9,11

other evidence suggested that the group encompassed by the phrase 'his people' was much more in the nature of a whānau or a hapū of only a few generations.

Te Oti Te Puke, another belonging to Ihakara's party, also described Kaitaha in terms which suggest whānau involvement, saying himself, his elder brother, and his father had used the fishery. Ihakara and Te Oti were second cousins, great-grandsons of Rangiuia. The eponymous ancestor of Ngāti Rauhoto was Rangiuia's great-grandmother; while Ihakara's Ngāti Hinerau were the descendants of Rangiuia, the name coming from his son Hinerau. The definition of a hapū was of some interest in the course of this hearing —Te Oti, clearly unwilling to say anything which might damage his party's case, said under cross-examination from the conductor of the opposing party, "I can't say how many succeeding generations constitute a hapu."[86]

Kōkoputaua was a fishing ground off Wharewaka claimed by Iharaira Te Puke in 1872, and again by Ihakara Kahuao's party in 1886. Te Oti Te Puke said of that fishery, "The owners of that ground are Ihakara, Iharaira, Ihaia Te Huia & myself." It too was included within that group's hapū claim to the fisheries in the area, but only those four people were put forward as owners of Kōkoputaua. Iharaira and Te Oti were brothers, and as second cousins to Ihakara they may have grown up in the same household, or in closely connected households, linked through their great-grandfather Rangiuia. This kin association, identified as a whānau under the conventional model, may have begun to weaken as they grew to adulthood, had children and grandchildren of their own, and established separate households. As individuals they fall within the classical definition of a whānau, but when one takes into account their position as older men and family heads (with their dependants presumably sharing their fishing rights) the right looks like what has usually been known in the past as a hapū right.[87]

Other individual fishing grounds were attributed to groups which corresponded to the whānau. Hitiri Te Paerata gave the names of eight different kōkopu grounds at Waihaha and the people associated with them. Most of the grounds were said to have five "owners" — Te Hautuku, Ohinemutu, Pouaka, Kauiora and Ngahiwi. Te Hautuku was the father of Pouaka, Kauiora and Te Ata Poia, Ngahiwi's wife. Ohinemutu's relationship to the other four is unclear.

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[86] Te Oti Te Puke, Tauhara Middle Subdivision, 19/5/1886, TMB 5 pp.399-400,404, TMB 6 pp.1,5, SMB 4 p.22; Judgment, ibid. 29/5/1886, TMB 6 p.75

[87] See pages 17-18,35-36,43-44 *supra*; Iharaira Te Puke, Kokoputaua, 29/3/1872, TMB 1 p.225; Te Oti Te Puke, Tauhara Middle Subdivision, 19/5/1886, TMB 5 pp.402-403, SMB 4 p.19. In the original case, Iharaira said, "I sent in a claim for the land under the water — It is not surveyed." Judge Rogan gave no particular reason for dismissing the case, but it was amongst a number of unsurveyed claims which were all dismissed.

The name of one of the kōkopu grounds, Te Whakaka o Tarakaiahi, is also significant as Tarakaiahi was Te Hautuku's grandfather and the ancestral *take* of that whānau in the area. Te Papanui Tamahiki also attributed more general rights in the Waihaha area to Te Hautuku and his children.[88]

At an earlier stage of occupation, rights over larger areas were attributed to members of a whānau. Counter-claimant Hōri Te Tauri, of Ngāti Tuhingarotu, Ngāti Te Iwikinakia, and Ngāti Te Karihi, described the history of the Hautū subdivision of the Te Hautū block. In the earliest stages of Ngāti Tūwharetoa settlement in Taupō, two of Te Iwikinakia's brothers had shared the land in question with him. One of them, Rākeiwairua, lost his rights when he gifted a portion of the land to Tūrangitukua's descendants, against the will of his brothers. The descendants of Puku, the other brother, inherited his rights on the land. The rights of these whānau members were seen by Hōri Te Tauri as the origin of the rights of the various hapū descended from them.[89]

Individual or personal fishing rights (where claims were often made in the name of just one person but tacitly included the rights of their dependents and household) were sometimes claimed in the Court. In many cases, these were an extension of a broader title, as people established their own individual right to be included in the right of their hapū to the land, or used the example of their own resource exploitation to strengthen the hapū claim. There are other instances which do however suggest that a personal title as against that of other hapū members was referred to, although the actual details of these rights are unclear from the Taupō records.

An example of the personal exercise of a right used as a reinforcement of the hapū right came in the Ōruanui case, when the course of the boundary between Ngāti Te Rangiita and Ngāti Te Kohera was under dispute. The lake shore at Te Torohanga fell within this area, and in describing his party's history and rights on the land, Hitiri Te Paerata of Ngāti Te Kohera added, "I have been in the habit of coming to the lake within the disputed points to get kokopu ever since I was a boy." Perenara Tamahiki, another of Hitiri's party, also said, "I used to go to the lake for Kokopus (fish)." Hōhepa Tamamutu, of Ngāti Te Rangiita, agreed that Hitiri and others had

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[88] Hitiri Te Paerata, Waihaha No. 3, 7/5/1897, TMB 11 pp.304-305; Te Papanui Tamahiki, ibid. p.311. See also pages 294-295 *supra*.

[89] Hautu, 26/4/1887 TMB 8 pp.152-153. See pages 281,294 *supra*.

occasionally done this, but said that he disputed Ngāti Te Kohera's right and would have done something about it if he had caught them actually fishing.[90]

Personal claims of rights were often put forward for fishing apparatus, such as a weir or nets, or a spot associated with the use of such devices. At Wairakei, the claimants Ngāti Karetoto had included a list of fishing sites in their initial description of their claim. In response, counter-claimant Hare Te Kume of Ngāti Te Rangiita spoke of his hapū's various resources, including a general statement: "We catch fish &c. on the land". Amongst his hapū claims he said, "I have also had a weir in one of the streams at Te Kiriohinetai", and also, "I did plant potatoes near the Huka falls." These uses of the singular personal pronoun, while commonly used in Māori to include the wider group, stand out from the rest of Hare's evidence.[91] Another counter-claimant in the same case, Erueti Tarakainga of Ngāti Tuapani, spoke of his personal rights — potato cultivations he worked with the assistance of his wife, and kōkopu weirs: "I also caught fish on the block at Waikau, Te Huka, and at Kiorehaire, and along the whole stream. I caught kokopu with weirs; the weirs were outside the block. I had weirs for kokopu at Te Huka and above."[92]

In the Tauranga Taupō No. 1 case, the hapū to be included in the title had already been determined, but not all members of the hapū were held to be entitled. In trying to establish his right to be included in Ngāti Te Rangiita's list, Hemopo Hikarahui described how he had used the resources of the block. He included his fishing rights among the ancestral cultivations and plantations: "I had fish traps in the River — I have never seen any other person carrying on the same occupation on my side of the River I have on the other side.... Haohaonoa was the name of the place I used to set my fishing pots."[93] Again the first association is with the fish traps and the use of them, rather than with the location of the fishery. Although Hemopo talked of his fishing in the past tense, he said he had only ceased to fish there around the time Te Kooti came to

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[90] Hitiri Te Paerata, Oruanui 11/4/1868, TMB 1 p.54; Hohepa Tamamutu, ibid. pp.56-57; Perenara Tamahiki, ibid. pp.58-59

[91] Poihipi Tukairangi, Wairakei, 31/5/1881, TMB 2 pp.223-224; Hare Te Kume, ibid. pp.226,233-236

[92] Rangatira, 13/2/1886, TMB 4 pp.179-180

[93] Tauranga Taupo No. 1, 1/2/1887, TMB 6 pp.367-368, SMB 4 p.246

Taupō. His claim was completely denied by the other claimants in the land, who said that they had never seen him fishing at Haohaonoa or anywhere else on the block.[94]

Taiere Koauau of Ngāti Te Rangihiroa made a clear distinction in his evidence between his personal interests and those of his hapū. He too not only gave the names of his fishing areas but associated them with the way in which he caught the fish:

> "Portions" owned by N. Te Rangihiroa — Motutahai, Otaranga, Tapuaeharuru, Te Kopua — Waikotukutuku, Maukiuki, these are all the places I know of — I have cultivated at Maukiuki and Waikotukutuku — I personally cultivated there at the time my father was living — I cultivated potatoes, corn & Kumara and used to catch Kokopus there — I used to catch the Kokopus with fern — I know the place I used to catch them, it was at Te Kopua near Waikotukutuku.[95]

Taiere further defined the nature of his rights. He said that Ngāti Te Rangihiroa's claim to the whole block was correct; and in discussing his own rights he said, "I only claim those portions I have named." Thus he clearly distinguished his own interests in specified resource areas from his hapū's claims over the area as a whole; yet, without access to transcripts of the evidence as given in Māori, it is impossible to say exactly what Taiere was 'claiming'.

Takiura Te Momo also suggested that his individual rights applied to specific resources rather than general areas of land. He claimed through Ngāti Te Kohera and Ngāti Kiri, whose rights over the land in question had already been established by the Court. He claimed to be a permanent resident on the land, along with most of his immediate ancestors, and listed a number of resources (including fisheries) used by himself and other relatives. Having discussed these, he told the Court, "I claim an interest over all those places at which we have been accustomed to work and which I have mentioned."[96]

Not all of those who claimed rights on behalf of themselves, their whānau, or their hapū made it clear if they were laying claim to an exclusive right. This was especially so when individuals made a claim to a personal right within an acknowledged overarching hapū right, as they only infrequently made a clear claim to an exclusive personal right under those circumstances. Most people were diffident about discussing the rights of anyone but themselves and

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[94] Hori Te Tauri, Tauranga Taupo No. 1, 3/2/1887, TMB 6 pp.369-370; SMB 4 pp.247-248; Judgment, ibid. TMB 9 pp.50-53

[95] Rangatira, 13/2/1886, TMB 4 pp.179-180

[96] Waihaha Names, 19/5/1887, SMB 2 pp.17ff.,29

their closest relatives, so as not to infringe upon the rights of others. Even when people said in the Land Court that they or their whānau were the only people to use a fishery, this cannot automatically be taken to mean that they were the only persons entitled to do so or that they had an exclusive right to do so. It was much more common for people making a hapū claim to a fishery to speak of it being the exclusive right of their hapū.

Eru Poihipi of Ngāti Rauhoto, Ngāti Ohomairangi, Ngāti Te Urunga and Ngāti Te Aokarere claimed an exclusive if somewhat general right on behalf of his hapū over the fisheries of the Rangatira block: "We have always fished on [the] shores of [the] lake and have had exclusive right having never been disturbed." This assertion was directed against Ngāti Te Rangihiroa in particular, one of whom (Taiere Koauau) had claimed a fishing right for them on parts of the land. Eru Poihipi did however add, "I am not trying to take possession of N. Rangihiroas part of the Block", while at the same time claiming the same fisheries named by Taiere. It would seem Eru sought to distinguish between rights to the fisheries, which he stood firm on, from Ngāti Te Rangihiroa's rights over parts of the lands of the block.[97]

Some cases pose more difficulty in determining what, if anything, was being claimed exclusively; a determination which is made more difficult by the translation of Māori evidence into English. During the Tauhara Middle subdivision case the fisheries of the north-eastern portion of the lake were hotly contested by the two rival parties. Both sides made claims of ownership and exclusivity, but there was little consistency in the forms of these claims even within each party. Te Oti Te Puke said of the grounds at Waitahanui, "these belonged to me and no persons could possibly question my right to them", while he said of other grounds at Kaitaha, "Ihakara, Ihaia, Iharaira and myself used those fishing places and the mana of it was in our four hands ... no any other hapus or persons had mana there."[98] Wī Maihi Maniapoto of the rival party denied these claims:

> Ihakara or his people never joined us in taking fish. I never knew they took fish themselves had I known it I should send them warning to desist on pain of being killed their places were on the <u>other</u> side [of the lake] where they had undoubted rights.[99]

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[97] Taiere Koauau, Rangatira, 13/2/1886, TMB 4 pp.179-180; Eru Poihipi, <u>ibid.</u> pp.189,191,200. See pages 297, 307 *supra*.

[98] Tauhara Middle Subdivision, 19/5/1886, TMB 5 pp.400,403, SMB 4 pp.17,19

[99] Tauhara Middle Subdivision, 22/5/1886, TMB 6 pp.31-33, SMB 4 pp.38-39

He implied a degree of exclusivity elsewhere on the block, as he and three other senior people of the four hapū he represented had been solely responsible for the survey and reservation of the fishing villages of Waipāhīhī and Wharewaka when parts of the block were sold to the government after the initial investigation in 1869. Such actions were not however within the range of traditional activity.[100]

Relationships between land, waters, and fishing rights

Large lake fisheries have a different relationship with the surrounding lands to that of river or swamp fisheries. The Land Court process could but exacerbate these differences, especially in Taupō where there was a unified approach to hearings within the great Taupōnuiatia Block. Many of the subdivisions within that area consisted of a relatively narrow stretch of lake frontage with a large hinterland extending into the bush. In such blocks, evidence of fishing rights and practices often took second place to evidence concerning the exploitation of land-based resources, which would have been of greater importance over much of the block. Nevertheless, there were sufficient small subdivisions with a high proportion of lake frontage to land to provide evidence of the interactions between uses and perceptions of land and water.

Many fishing areas and other features in the lake were consciously associated with places on the lake shore such as settlements and beaches. However, many people did not put a great deal of emphasis on such associations, simply putting shore sites and fisheries together in their précis of their resources on the land. An example of this type of connection is found in Eru Poihipi's description of the resources of the Rangatira block: "Tapuaeharuru is a cultivation and a pa hinake there.... Te Waikereru is a large stone in the lake a cultivation on shore there.... Pirua is the landing place of the Taniwha Horomatangi."[101] Most of the fishing areas and specific fishing grounds mentioned by both parties in the Tauhara Middle case were associated with a place on the shore, mostly a fishing village such as Wharewaka or Waipāhīhī, or sometimes a beach.[102]

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[100] See page 322 *infra*.

[101] Rangatira, 15/2/1886, TMB 4 pp.187-188

[102] Arama Karaka, 17/5/1886, TMB 5 pp.378-379,385, SMB 4 pp.5,9; Te Oti Te Puke, ibid. 20/5/1886, TMB 5 pp.400,402-403, TMB 6 p.5, SMB 4 pp.19,22-23; Wi Maihi Maniapoto, ibid. 22/5/1886, TMB 6 pp.31-33, SMB 4 pp.38-39

One possible exception to this trend is the fishing ground Kōkoputaua, which was claimed as a block in its own right by Iharaira Te Puke: "...this is a portion of Lake Taupo — I sent in a claim for the land under the water." After that case was dismissed (seemingly because it had not been surveyed, although this was not a legal requirement in 1872), Kōkoputaua was next claimed by Iharaira's brother Te Oti as part of the fishing resource of the Tauhara Middle block. Even in this case, Kōkoputaua was associated with the "permanent residence" at Wharewaka in the same way that almost all the other fishing grounds listed in that case were associated with a shore settlement.[103]

Ann Williams provides a modern explanation of the relationship between the lake shore and its waters, from a contemporary Ngāti Tūwharetoa kaumātua:

> Asher (pers. comm. 1987) indicates that Maori settlements around Lake Taupo were connected with portions of the lake. These were accessible to, and exploitable by, the residents of the relevant settlements. Outside individuals, he suggests, would not have transgressed onto these portions without permission. Suitable tributary rivers and streams could also be exploited from connecting settlements. 'Connected' in this sense refers not only to proximity to the lake, but also to other ties, which could allow access to fish resources.[104]

This is in keeping with the thrust of the evidence given by others of Ngāti Tūwharetoa some hundred years earlier concerning the connection between lake shore settlements and fishing resources.

Asher's statement also raises the issue of fishing areas that were connected with a settlement some distance from the resource, or with a widely scattered group of people. People in the Land Court made numerous references to travelling to use a fishing resource. It would seem, however, that most of these references reflect the seasonal round of resource exploitation, with people moving from one area to another whilst the richest pickings were to be found, rather than a genuine divorce between usage or occupation rights over an area of land and its connected waters. In this sense, the rights were not strictly 'non-territorial' rights, which denotes a fishing right exercised in complete independence from the rights to the adjacent land. This may be yet another example of the influence of the Native Land Court process on concepts of Māori rights, as some fishing rights seemed to be considered as non-territorial rights in the Court when they were not necessarily so. This was because artificially-imposed linear boundaries could break up the

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[103] Iharaira Te Puke, Kokoputaua, 29/3/1872, TMB 1 p.225; Te Oti Te Puke, Tauhara Middle Subdivision, 19/5/1886, TMB 5 pp.402-403; SMB 4 p.19

[104] Williams, p.77. See also Hina Taitumu, Rotoaira, 10/3/1947, Tokaanu MB 28 p.268

recognized resource areas of particular hapū or groups, especially if they overlapped with those of other hapū. In some other cases where people travelled over large distances to use fishing resources this may have been done under a genuine non-territorial right, but even then people could usually call upon kin relationships over a large area to validate their seasonal use of a resource not normally connected with their usual area of residence.

The Ōruanui block, while predominantly an inland area, had a narrow stretch of lake frontage around Whakaipo Bay. A number of people said they had travelled from their usual residences to catch fish along this stretch of lake shore (perhaps to reinforce the rights of their various hapū to the entire area). Hitiri Te Paerata, representing Ngāti Te Kohera and Ngāti Raukawa from the west of the lake, said, "I have been in the habit of coming to the lake within the disputed points to get kokopu ever since I was a boy", referring particularly to the fishery at Te Torohanga. Perenara Tamahiki of Ngāti Te Kohera also said, "I used to go to the lake for Kokopus (fish)."[105] He seemed to have come even further to do so, giving distant Waihaha as his home.

Hōhepa Tamamutu of Ngāti Te Rangiita, while admitting that Hitiri had used this fishery, claimed it properly belonged to him. He too implied that he travelled to fish there as he named Ōruanui pā as his usual residence. He did however claim descent from Kapawa, who had a pā at Whakaipo, and he himself had a pā not far inland. In these circumstances, it is likely that while Hōhepa usually lived further inland, this part of the lake formed part of the seasonal resource exploitation round of his hapū. This view is supported by the findings of Judge Monro, who awarded that part of the block to Hōhepa and others of his hapū.[106] There is also evidence from soldiers based at the Tapuaeharuru garrison in the early 1870s that residents of the Tapuae-haruru pā, to the east at the Waikato River outlet, travelled to Whakaipo and elsewhere to fish in the proper season.[107]

The Ngāti Hinerau and Ngāti Rauhoto claim to the Tauhara Middle block rested largely on their supposedly having used the fisheries off Kaitaha and elsewhere, as they could give little evidence relating to their use of the land; and their tenuous claim to the land and the fisheries was

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[105] Hitiri Te Paerata, 11/4/1868, TMB 1 p.54; Perenara Tamahiki, ibid. pp.58-59

[106] Hohepa Tamamutu, 8/4/1868, TMB 1 pp.37,39,41,55-57; Judgment, ibid. 14/4/1868, pp.88-89. See page 326 *infra*.

[107] Williams, p.79

hotly disputed by the other party in the case. Under pressure, people from these hapū admitted to having travelled from distant settlements outside the block to use the fisheries. Ārama Karaka stated:

> There is no Kainga at Kaitaha now. I mean this Hapu Ngati Hinerau or Ngati Rauhoto have none there.... Ihakara went there to catch fish from Tapuaeharuru & Rangatira although they went from these places the fishing places are theirs. They fish there up to the present time ... and if this were the proper time for fishing they would do so now on these fishing grounds.[108]

Te Oti Te Puke also said that he had travelled across Tapuaeharuru Bay from Rangatira and Tapuaeharuru, as well as from Wharewaka and Waipāhīhī on the block, to use the fisheries at Kaitaha.[109]

Wī Maihi Maniapoto of the other party in the Tauhara Middle case also implied that his people sometimes travelled to use some of the fisheries of the block. In their case, the journey was made from the hinterland of the block rather than from elsewhere on the lake:

> The name Wharewaka is not confined to the point it extends to some distance along the beach and inland on either side. Oaia was worked from there. The Kokopu taken here were conveyed through that block to Opepe and the settlements there & consumed.[110]

Opepe was not situated along the flats at the lake edge, but lay some 13 km from the lake shore. It was an important local settlement, being the site of an Armed Constabulary post and an important timber-milling centre by the time of the hearing.

Again, there is evidence from this case of both seasonal exploitation and journeying from different localities to use a resource. Some of the fishing resources on Tauhara Middle were certainly of seasonal importance, such as Waipāhīhī, where inanga were caught in great quantities when their shoals were attracted to the stream mouth by the outflow of thermal waters into the lake.[111] In a much later example of journeying to use a seasonal resource, Tokaanu Māori were described by the ichthyologist W.J. Phillipps as travelling to Rotoaira every November to catch kōaro. He had observed this himself in the 1920s. Evidence was given in the later Rotoaira hearing in the Māori Land Court suggesting that customary rights to use the resources of

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[108] Tauhara Middle Subdivision, 17/5/1886, SMB 4 p.9, TMB 5 p.385. See page 299 note 69 *supra*.

[109] Tauhara Middle Subdivision, 20/5/1886, TMB 6 p.5, SMB 4 pp.22-23

[110] Tauhara Middle Subdivision, 22/5/1886, SMB 4 p.38; TMB 6 p.31. See also Williams, p.78

[111] Wi Maihi Maniapoto, Tauhara Middle Subdivision, 22/5/1886, TMB 6 p.32, SMB 4 pp.38-39

Rotoaira were not restricted to those who lived on its shores, but extended to the inhabitants of the wider district, including the southern shores of Lake Taupō.[112]

It is not necessarily significant that, as in the Tauhara Middle case, one party travelled from outside the block while another travelled from places within, given the often arbitrary boundaries of blocks brought before the Land Court. Cases heard in the Court may well not give a good indication of the mechanics of non-territorial or non-occupationary seasonal rights, as judges almost always gave preference to the rights of those permanently resident on the land ahead of other non-occupationary rights. Even in cases where people gave comprehensive evidence of the exercise of fishing rights, these were not mentioned in judgments, and so it seems that judges saw fishing rights as being of only minor importance in establishing rights to the adjacent land.[113]

The role of boundaries in the exercise of fishing rights was somewhat different in a large lake than in a smaller lake or river. In the Native Land Court, the subdivisions of the Taupōnuiatia block were bounded by the lake shore, and so the lake itself remained uninvestigated. Despite the fact that the lake itself was not under investigation, people often discussed the fisheries of the adjoining lake area when they discussed the land. Judges did not discourage this, and so the boundaries between the blocks seem tacitly to have been extended out into the lake by the different claimants for the purpose of determining title in areas where there were fisheries.[114] As almost all the fisheries in Lake Taupō were situated close to shore (Horomatangi Reef being one of the few exceptions), the question of open water boundaries between fishing grounds and hapū holdings did not arise. The fishing grounds in the lake shallows were by and large associated with a neighbouring shore settlement or locality, and the relationship between the land boundaries of hapū and their fishing areas in the lake were not discussed in the cases heard by the Court.

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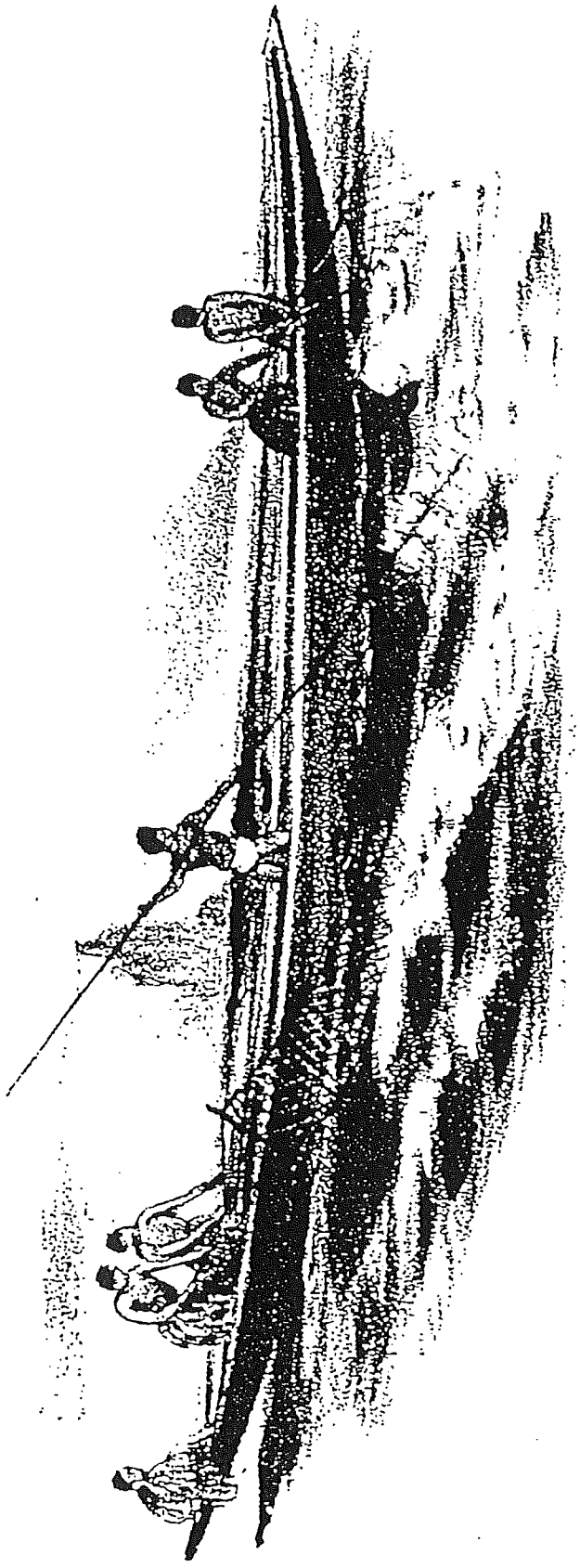
[112] Phillipps The Fishes of New Zealand, pp.36-37; Phillipps 'The Koaro', p.190; John Atirau Asher, 20/2/1955, Tokaanu MB 32 p.131; Rewha Taura, ibid. 30/5/1955, MB 33 pp.59-60. The Native Land Court changed its name to the Māori Land Court in 1947 — see page xii note 2 *supra*.

[113] See pages 291-292 *supra*.

[114] See pages 291-292 *supra*. The lake bed proper remained uninvestigated by the Court and was purchased from Ngāti Tūwharetoa by the Crown in 1926 when the fishing rights sale was negotiated — page 288 *supra*.

Fig. 6 **George Angas: Modes of Fishing on Lake Taupo, 1847**
Large drag nets such as the one shown in this drawing needed several people to draw them in.
Courtesy of the Alexander Turnbull Library, Wellington, New Zealand, ref. F 106454½



Exceptions to this came when tributary streams and rivers used for fishing were also regarded as boundaries between groups. This is another aspect of customary tenure and fishing rights which may have been affected by the Native Land Court process, in this case the usual practice of Pākehā surveyors placing boundaries along prominent natural features such as rivers. The role of the Waikato River as a boundary featured in the Wairakei hearing. While the Wairakei block itself abutted onto the Waikato River below the Huka Falls, the Ngāti Rauhoto counter-claimants maintained that the area was a continuation of Ngāti Rauhoto's lands on the other side of the river, towards Tapuaeharuru and the lake. Ngāti Rauhoto's right to the east of the river was supported by the claimant, Poihipi Tukairangi of Ngāti Karetoto, who himself had a right there through Ngāti Rauhoto, but he denied any rights for them to the west of the river.[115] When the case was re-heard Āperahama Te Kume, representative of the original grantees, pressed Initia Te Amo of Ngāti Rauhoto on the subject of the river, in light of the Ngāti Rauhoto assertion that their land extended across both sides of the river: "[Āperahama:] Does not a river form a natural boundary? [Initia:] Yes, if it were as big as the Waikato it would be."[116] Once again the claims of Ngāti Rauhoto to extend their interests across the river were rejected.

The Tauranga-Taupō River, a major lake tributary, was also seen as forming a dividing boundary. Te Heuheu Horonuku claimed that the river formed a boundary between his people Ngāti Te Mahau and Ngāti Te Rangiita to the south, and Ngāti Tuhinaroto to the north. He said that each party had *kāinga* and cultivations only on their respective sides of the river.[117] When more detailed information regarding Ngāti Te Rangiita's occupation of the block was given, Hemopo Hikarahui's evidence supported the idea that the two banks of the Tauranga-Taupō River were regarded differently. He said: "I have fish traps in the River — I have never seen any other person carrying on the same occupation on my side of the River I have on the other side."[118] He implied by this that his rights were confined to his side of the river.

At Hautū, on the Tongariro River to the south of the lake, there were two "fish pa" on opposite sides of the river. One of these was also called Hautū, the other Te Awamatemate.

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[115] Poihipi Tukairangi, Wairakei, 31/5/1881, TMB 2 p.224; Hare Te Kume, ibid. pp.226-227; Initia Te Amo, Waiarakei Rehearing 25/1/1882, TMB 3 pp.1-2; Werahiko Tahere, ibid. p.3

[116] Initia Te Amo, Wairakei Rehearing, 25/1/1882, TMB 3 p.2

[117] Te Heuheu Tukino, Tauranga No. 1, 1/4/1886, TMB 5 pp.122-123

[118] Tauranga Taupo No. 1, 1/2/1887, TMB 6 pp.367-368, SMB 4 p.246

According to Hōri Te Tauri, the Ngāti Tuhinaroto, Ngāti Iwikinakia, and Ngāti Te Karihi counter-claimant, he and his father Wirihana had caught fish at both of these weirs belonging to their hapū. Yet he also said that people of Ngāti Waewae and Ngāti Rongomai, their neighbours and relatives, used to come from Waipapa to fish at Te Awamatemate *pā* "when they wanted anything tasty". He did not say why they fished only at the *pā* on one side of the river, but the Te Awamatemate *pā* was the one closest to Ngāti Rongomai's residences on the lake.[119]

There was often an acknowledged relationship between fisheries and the other resources of a district. In those cases in the Taupō Land Court where fisheries were discussed, they were usually discussed as part of the resource package of a particular locality rather than in isolation. The Land Court process, which dealt with defined parcels of land, encouraged such locality-based claims but the large number of statements couched in these terms suggests that the form favoured by the Court had its origins in a traditional Māori form of expression of rights.

Claims of rights in cultivations and in fisheries often went hand in hand at the same locality. This is to be expected, as fishing villages which were occupied either permanently or for several months in each year would need other means of sustenance beyond fish. In the Wairakei case, Erueti Tarakainga of Ngāti Tuapani was cross-examined by Enoka Aramoana of Ngāti Te Rangihiroa. He denied Ngāti Te Rangihiroa's current claims, but agreed that Enoka's old people had used a number of resources, including *kōkōwai* (red ochre), fern root, and kōkopu, on one part of the block. The fern root and kōkopu had been gathered only while the ochre was being processed, and it was implied that the extraction of the ochre, and therefore the use of the fishery, was a sporadic occurrence.[120]

In most other places, there was not a clear distinction between permanent and temporary use. On the Rangatira block, Taiere Koauau stated that he and others of Ngāti Te Rangihiroa lived at a number of settlements on the block. At one of these places, Waikotukutuku, he personally had occupied, fished for kōkopu, and grown kūmara, potatoes and corn. Elsewhere on the same block, Eru Poihipi of Ngāti Rauhoto and Ngāti Ohomairangi associated the pā of Tapuaeharuru with a cultivation, and a *pā hīnaki* of the same name in the river

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[119] Hori Te Tauri, Hautu, 4/4/1887, TMB 7 pp.378-380

[120] Erueti Tarakainga, Wairakei, 4/6/1881, TMB 2 p.242

nearby.[121] To the west of the lake, Hitiri Te Paerata of Ngāti Parekāwa and associated hapū listed over a dozen *kāinga* or other settlements on the Taupōnuiatia West block which were associated with fishing and other resource use, especially cultivations of unspecified crops.[122]

Property rights in the Taupō fishery

Many of the issues of the relationships between land and fishing rights, such as the connections made by Taupō Māori between land and fisheries areas, and temporary or seasonal exploitation of fisheries independent of a right to the surrounding land, lead into the issue of property rights in fisheries. The analysis of traditional fishing rights as property rights has been a major area of debate in the current academic and legal discussion of customary Māori fishing rights, influenced by the Pākehā tendency to explain Māori rights in technical Pākehā terms.[123] One of the leading issues in this debate is whether fishing is more closely analogous, in Pākehā legal terms, to an ownership right or a usufructuary right. It is also important to examine whether Māori exercising customary rights themselves regarded all freshwater fisheries in the same way in this respect, or made distinction between different 'levels' of rights. It is hoped that an examination of statements in the Court may demonstrate the ways in which Māori themselves spoke on these topics.

However, the usefulness of these statements in the Court is diminished by the translation process, which has laid at least one level of Pākehā interpretation over the original Māori statements. This is compounded further by the propensity of Land Court judges and other Pākehā officials for treating fishing rights as inferior and supplementary to land rights, and simply a part of the bundle of rights represented by Pākehā concepts of land ownership. There are numerous difficulties in using English translations, in the absence of parallel Māori texts, to distinguish nuances in the meanings of kaumātua and kuia statements on this subject. Often, terms reflecting ideas of usage, occupation and ownership are scattered through short passages of the English text, seemingly with little distinction. It may well be that people were expressing their

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[121] Taiere Koauau, 13/2/1886, TMB 4 p.179; Eru Poihipi, ibid. 15/2/1886, p.198

[122] Hitiri Te Paerata, 1/3/1886, TMB 4 pp.271-285. See also Williams, pp.78-79

[123] *e.g.* Paul McHugh The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi Auckland: Oxford University Press, 1991, pp.72-74,97-98,141-143

rights in language that was not easy to translate accurately or succinctly, with the result that it was rendered into stock phrases of Court terminology. Also, as the Land Court was a body which determined rights as between contending parties of Māori, if all parties appearing in the Court understood implicitly the nature of the fishing right being debated, it would be unnecessary to discuss the cultural concepts of property rights implicit in what they were saying. In such circumstances an analytical exposition of the nuances of such rights cannot be expected.[124]

Bearing these difficulties of interpretation in mind, in most cases fishing rights were associated with the occupation of the land. Claims in the Native Land Court were generally made on the basis of *take tupuna* and *ahi kā*, or ancestry and occupation — after people had given their whakapapa, they would usually proceed to give an account of their ongoing occupation of the land. Where appropriate, these descriptions would include the fisheries used by their party. Many of the examples of the association of fisheries with settlements and other resource areas given in the previous section come from these overview statements of occupation rights.

Te Papanui Tamahiki gave his views on what constituted occupation in the Waihaha case, saying, "According to Maori custom occupation was known by tribes having large houses also stages for drying their nets."[125] In a more direct application of occupation to fishing, Hitiri Te Paerata spoke of the rights of one whānau over some fishing grounds at Waihaha:

> These were ancestral Kokopu grounds passed from his ancestors to Hautuku and from him to Kawira father of those children. Down from Ngaherehere to Kawiora they had great right the evidence being permanent occupation from the ancestral times — on both sides.[126]

Elsewhere in his evidence, the translation of Hitiri's statements regarding the right of Kauiora and his whānau over these fisheries was non-committal as to the nature of the right involved, except when describing one ground, about which he was translated as saying, "the same people were the owners".[127]

In a somewhat later expression of the nature of fishing rights, a number of the northern and western lake hapū of Ngāti Tūwharetoa petitioned Parliament over the sale of the fishing

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[124] See pages 126-127,129-130 and note 123 *supra*.

[125] Waihaha Names, 13/6/1887, TMB 9 p.17

[126] Waihaha No. 3, 7/5/1897, TMB 11 p.305

[127] Waihaha No. 3, 7/5/1897, TMB 11 p.304. See pages 304-305 *supra*.

rights in the lake to the Crown. The petition was in English, and in their words, "there are at least nine tribes who occupied the Fishing grounds from Te Hatepe to Tapuaeharuru and thence westward..."[128] It is suggestive that they chose to claim "occupation" of the fishing grounds, when in the context of the imminent sale of the fishing rights, the expression of a fuller property right might have been expected. Although the petition appears to have been drafted in English, this is not a natural English idiom, and this unusual use of the word 'occupation' seems to imply something much stronger than a simple usage right over the fisheries concerned.

In the Taupō minute books, language referring directly to usage rights rather than occupation or ownership is uncommon. However, there were a number of occasions on which people explicitly claimed rights in a particular resource rather than in the land underlying the resource or a general area.[129] Rather than being non-territorial rights, separate from any interest at all in the surrounding land, these rights were usually personal in nature and made under the hapū umbrella claim to the land in general. This sort of right would seem to be analogous to a usufructuary right rather than any sort of underlying proprietorial or possessive right in the soil.

Takiura Te Momo put forward a claim to be included in the Waihaha block under Ngāti Te Kohera, Ngāti Kiri and Ngāti Moekino. He claimed through ancestry and "right of occupation" on part of the land, saying that his parents, grandparents, and other close relatives had also done so. The fishing beach at Whakahoro, near Waihora, was among the resources he claimed on behalf of himself and others. Takiura's language in describing the nature of such rights was very suggestive of some type of usage or usufructuary right. At one point he said, "I claim an interest over all those places at which we have been accustomed to work and which I have mentioned", while later he added, "I consider people have a right to wherever they worked."[130] Thus he clearly linked rights to the resource with its use rather than a more intangible possessory right. He was also expressing the importance of continued access to resource rights after the passage of the land through the Court. There were no provisions available for people to ask for only an easement or the grant of a usage right over land, based on a customary non-territorial right, rather than the full rights of ownership which the Court conferred.

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[128] Petition of several hapu of Ngati Tuwharetoa, Taupo, 15/4/1925, to Native Minister, MA 13/23b, N.A.

[129] See page 307 *supra*.

[130] Waihaha Names, 19/5/1887, TMB 8 pp.262-264,277, SMB 2 pp.17-19,29,33

Some distinctions were made between 'ownership' rights and non-territorial rights as exercised at a hapū level. On one occasion Hōhepa Tamamutu distinguished between usufructuary rights and 'full ownership' of the land: "Digging fern root would not give a title to the land. Our fathers used to go and dig wherever there were good fernroot." This statement was made in response to the evidence of the Ngāti Rauhoto counter-claimants, who put forward a claim to the land on the basis of having dug fern root at places on the block. This is another example of the problems faced in the Native Land Court by those with strong claims to resource rights but weaker claims to occupation rights, which were what the Court almost always based its judgments upon.[131]

Terms implying 'ownership' rights were commonly used in reference to land and fishing rights in the minutes of the Native Land Court in Taupō. Blocks of land were usually regarded as being 'owned' by hapū groups. At Ōruanui, Tarakainga of Ngāti Te Ao said that Ngāti Rauhoto "owned the land to the east of this boundary."[132] In the Rangatira case, Taiere Koauau talked of particular localities rather than a general area being "owned" by Ngāti Te Rangihiroa. All of these "portions", as Taiere called them, were associated with resource uses, including fishing.[133]

Fishing villages and fishing grounds were among the types of property described in terms of 'ownership'. Hitiri Te Paerata said the *kāinga* and fishing settlement Otutiro, to the west of the lake, "belongs to N' Parekawa and N' Kohera"; while the nearby *kāinga*, cultivation and fishing place Te Hapua was "[o]wned by the same hapus [Ngāti Parekāwa and Ngāti Tuwhakarehu]."[134] Elsewhere in that region, Te Papanui Tamahiki said that the Kōtukutuku fishing ground "belonged to" Ngāti Kiri, Ngāti Wheoro and Ngāti Tarakaiahi. He also said that a number of fishing grounds at Te Papa "belonged to my grandfather, Whakatohe, and the N. Tarakaiahi people have it in possession today."[135] In this case 'ownership' was attributed not only to a hapū (or whānau), but an individual also. Other individuals spoke about their 'owner-

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[131] Hohepa Tamamutu, Oruanui, 9/4/1868, TMB 1 p.48; Paora Te Rauhihi, ibid. p.45; Tarakainga, ibid. p.46

[132] Tarakainga, 9/4/1868, TMB 1 p.46

[133] Taiere Koauau, 13/2/1886, TMB 4 p.179

[134] Tauponuiatia West, 1/3/1886, TMB 4 pp.277,284

[135] Tuhua Hurakia Waihaha, 14/2/1887, SMB 4 pp.309,312. See pages 302-303 *supra* on the interaction between personal and collective rights in this fishery.

ship' of fishing grounds. Te Oti Te Puke named a number of fishing grounds in the margin of the lake and said, "these belonged to me and no persons could possibly question my right." He also said that the fishing ground Kōkoputaua "belonged to" himself and other relatives.[136]

From the examples given, it can be seen that it is not easy to draw any distinctions on the subject of usufructuary or occupation rights versus proprietorial or ownership rights in the Lake Taupō fishery, because of the imprecision of deployment of terms in the minute books themselves. However, the language of the 1925 petition is significant, as this document was written in English and thus the word 'occupation' was deliberately chosen to describe the nature of the rights of the signatory hapū, even though the Crown recognized iwi ownership of the lake. A number of earlier Land Court examples have been cited where an occupation or usufructuary right was implied if not directly expressed. This too lends weight to the idea that such a usufructuary right was seen as a normal way of considering fishing rights, and that where people claimed a usufructuary right at a hapū level they did not regard this as an inferior title, subject to some other 'ownership' right in the fishery. However, in the case of personal claims to fisheries or fishing rights, where expressions of rights of a usufructuary nature were much more common, a larger group might have been seen to have had wider rights over the area in which the fishery was found. These personal claims were often made under the umbrella claim of the hapū to 'ownership' of the land under investigation by the Court.

Aspects of management and control

As has been seen, fishing rights could be exercised by anyone from a group of hapū to a small household. Complementary to questions of 'ownership' or usufructuary rights are questions of control. Such questions include the making of decisions concerning the use of fisheries belonging to a hapū or whānau, the powers vested in the manager of a fishery, the extent of the rights of chiefs in communal fisheries, and the bearing of mana on issues of control. Unfortunately, in the Taupō district most of these questions can be but sketchily addressed from Native Land Court evidence. As the entire lake was covered by the unified Taupōnuiatia case,

[136] Tauhara Middle Subdivision, 19/5/1886, TMB 5 pp.400,402-403, SMB 4 pp.17,19. Both English translations of each example read "belonged to".

most cases dealing with lake fisheries were relatively free from the deep contention seen in the records of other Land Court areas. Thus the evidence covering every aspect of fisheries and their management is not found in the Taupō records. Nevertheless, some aspects of fishery management and control were discussed by Taupō people.

Chiefs and kaumātua had an acknowledged role in resource management. When Hitiri Te Paerata gave an outline of the resource areas and associated settlements to the west of the lake, he listed not only the names of the hapū connected with each but also the "principal man" or "chiefs" for each resource area.[137] Chiefs could apportion the resource areas and produce under their control, as explained by Ngāti Kurapoto and Ngāti Kapawa chief Hōhepa Tamamutu: "The food growing at Wetanui was planted by my permission, and was given to my relative Waitawa, married to a man of Ngatirauhoto. She asked my permission."[138]

Outward expressions of a right to control the use of a fishery (as opposed to claims of 'ownership' or usufructuary rights) were rare in Taupō. One such example, albeit in a contact era context, was the actions of Wī Maihi Maniapoto and others in reserving the fishing villages of Wharewaka and Waipāhīhī from sale to the Crown:

> It was in consequence of the very large supply of Whitebait obtainable here [Waipāhīhī] that it was reserved and that reserve was made by myself, Mere Hapi Hamuera and Popoki when the land round was sold to the Government.... I made a reserve also at Wharewaka — for a settlement for fishing purposes, the same four made that reserve also.[139]

When the land was originally granted in 1869, the grantees included Wī Maihi Maniapoto's father Maniapoto Te Hira of Ngāti Hineure, Mere Hapi's father Paora Hāpimana Huriwaka of Ngāti Tūtemohuta, Hamuera Takurua of Ngāti Tūtetawhā, and Te Popoki Te Kurupae of Ngāti Te Urunga. These were the four hapū represented in the Court by Wī Maihi Maniapoto; the four individuals named were all related through their ancestor Tūtemohuta, some five to seven generations previous. It is unclear whether their ability to restrict access to the fishery (by reserving the fishing village) rested on their authority as Crown grantees or their positions as representatives of their respective small hapū.

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[137] Tauponuiatia West, 1/3/1886 TMB 4 pp.271-285

[138] Omaunu, 17/3/1869, TMB 1 p.212

[139] Wi Maihi Maniapoto, Tauhara Middle Subdivision, 22/5/1886, SMB 4 p.39, TMB 6 pp.32-33; Te Rangitahau, ibid. 25/5/1886, SMB 4 p.54; Judgment, ibid. 29/5/1886, TMB 6 pp.73,80-81

One concrete way in which chiefly rights were exercised over fisheries was in the implementation of *rāhui* or closed seasons. *Rāhui* were imposed to protect a resource from over-working, after pollution of the waters, or to reserve a resource to oneself, if one had sufficient mana for the *rāhui* to be observed by others. The imposition of a *rāhui* was regarded as a sign of usage rights or 'ownership'. Wineti Paranihi said of part of the Rangipō North block, "My ancestors used to get Flax juice in former times in N^{os} 2 & 3 Blocks — they used to rahui (make it sacred) it."[140]

A well-known example of *rāhui* over the Taupō fishery was that imposed over the waters at the southern end of the lake after the death of Te Heuheu Mananui. The landslide that engulfed Te Rapa became highly tapu because of the number and rank of the people killed by it. Debris was pushed out into the lake waters, which also became highly tapu. A *rāhui* was then imposed over the fishery, with posts at Kuratau and Waitahanui pā to indicate this. Because of the great mana of Te Heuheu, only a person of equally high rank could lift the tapu and the *rāhui*. This did not happen for over a year, until Te Heuheu's son Horonuku returned and Te Takinga, the *upoko ariki* of Ngāti Tūwharetoa, performed a special fishing ceremony at Waihī to reopen the fishery. Similarly, the missionary Richard Taylor wrote how Te Herekiekie "tapued the lake and the ground around the place" after the murder of the missionaries Manihera and Kereopa at Tokaanu in 1847.[141]

Mana and its implications for land, resources, and people were widely discussed in the Taupō Land Court. In the context of land and resource rights, mana was often attributed to the ancestor who was the *pūtake* or source of the rights on the block, often the eponymous ancestor of the claimant hapū. Ngāti Te Kohera claimant Tini Waata said, "Parekawa has the mana over the whole of this land from Pouakani to Kuratau", Parekāwa being Te Kohera's mother.[142] Mana was also one of the general *take* or basis to rights put forward in the initial statements made by major witnesses. Te Heuheu Horonuku introduced his claim to Taupōnuiatia West by listing the ancestors he claimed from and the hapū he represented, before saying:

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[140] Wineti Paranihi, 16/3/1886, TMB 5 p.4

[141] Grace, pp.458-459; Journal of Richard Taylor, 11/6/1846, vol. 4; 22/3/1847 & 22/4/1847, vol. 5

[142] Tauponuiatia West, 10/3/1886, TMB 4 p.342

> I also claim through occupation my fires having been kept burning — I also claim through mana and conquest — fugitive tribes also came to me for protection — My mana has remained permanent & over this land and outside from the time of these ancestors [Tia, Tūwharetoa, "and some others"] down to the present time.[143]

Te Papanui Tamahiki made a near-identical statement in his claim for the Waihaha block on behalf of Ngāti Tarakaiahi, Ngāti Wheoro and Ngāti Kiri.[144]

Mana was seen as a spiritually-derived authority which could be exercised over people (*mana tangata*), or land (*mana whenua*), or sometimes both. Tini Waata explained mana to the Court thus:

> Mana is in those who are strong to hold the land and also who are liberal to the people. When persons are found of that kind they generally have control of the lands as well as the people. My father was a person possessing very great mana. He was Te Kohika — it was through him I got mine. He derived his mana from his ancestors.[145]

He did however distinguish between the extent of mana over land and mana over people: "My father had Mana over the people of N. Tarakaiahi because he saved them, but he had no Mana over their lands." He did not put forward any claim to Ngāti Tarakaiahi's lands or fisheries on the basis of his father's mana.[146]

Others differentiated between *mana tangata* and *mana whenua* with reference to the relationship of particular individuals to the land under investigation. Eru Poihipi, son of the influential northern chief Te Poihipi Tukairangi, told the Court: "Tuwharetoa has the mana over the whole of Tauponuiatia — The mana was descended from Tuwharetoa but not over this Block.... I admit the mana of Tuwharetoa over the people of Taupo but not over the land." He also stressed his own *mana tangata*: "My mana is over people as well as land — Ohomairangi & Te Aokarere owned this land in our ancestors time — also Rauhoto and Te Urunga. Ohomairangi derived his mana through Ngatoroirangi."[147] While acknowledging Ngāti Tūwharetoa's position in the region, Poihipi was explicitly rejecting the right of the wider iwi to interfere with his peoples' rights on the land. The ancestors from whom he claimed his own mana were the

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[143] Te Heuheu Tukino, Tauponuiatia West, 25/2/1886, TMB 4 pp.252-253

[144] Tuhua Hurakia Waihaha, 9/2/1887, TMB 7 p.10

[145] Waihaha Names, 31/5/1887, SMB 2 p.66

[146] Waihaha Names, 31/5/1887, SMB 2 p.72. Te Kohika was a prominent chief and warrior of Ngāti Parekāwa and Ngāti Te Kohera at a time when the district to the west of the lake was under pressure from northern raiders — see page 283 *supra*; Grace, pp.271,322-325.

[147] Rangatira, 15/2/1886, TMB 4 pp.193-196. See pages 284-285 *supra*.

more recent eponymous ancestors of his hapū, who all claimed descent from Ngātoroirangi and his sister Kuiwai rather than Tūwharetoa.[148]

Mana tangata and *mana whenua* could be derived either from the same source or from two different ancestral branches. Te Heuheu Horonuku claimed Waihī Kahakaharoa on behalf of his own hapū Ngāti Tūrumakina and Ngāti Te Mahau, based on descent from Te Heuheu Tūkino, and occupation, Waihī being the main *kāinga* of Horonuku and his family. He stated, "I also claim from occupation — Mana over the land and also mana over the people."[149] In contrast, Te Papanui Tamahiki recognized a dual derivation of mana in the case of his hapū ancestor Tarakaiahi: "Tarakaiahi went to live there [Waihaha] through his fathers mana — his title to land he got from his wives — his fathers mana was over men. Mana means authority over men not the Land." Other evidence had suggested that Tarakaiahi came onto the land at Umurua as the result of his marriage to Ruawhango of Ngāti Moekino, but that he derived his right at Waihaha through his descent from Te Kohera and Parekāwa. He had other wives who traced their descent from Tia rather than Tūwharetoa, Tia being an important ancestor in the western lake area.[150]

The expressions of mana given thus far have all referred to general areas of land, but the term was also applied, albeit less frequently, to the control of particular fishing resources. In his claim to the fishing grounds off Kaitaha, Te Oti Te Puke claimed ownership for himself, Ihakara Kahuao, Iharaira Te Puke, and Ihaia. He combined expressions of ownership and mana in his evidence: "these fishing grounds belonged to the same four and others — and they four had the mana and of the Canoes also and no other hapus or persons." The particular fishing grounds which Te Oti claimed to have mana over were amongst those which Wī Maihi Maniapoto of the opposing party stated had nothing to do with Te Oti's people.[151]

Disputes over fishing rights advanced before the Court provide some examples of claims to have a right to regulate access to fisheries. A common factor in these statements is the

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[148] Reweti Te Kume, Waiaruhe, 17/3/1869, TMB 1 pp.207-208; Hare Te Kume, Rangatira, 16/2/1886, TMB 4 p.203; Judgment, ibid. 22/2/1886, pp.233-236

[149] Waihi Kahakaharoa , 20/3/1886, TMB 5 pp.15-16

[150] Te Papanui Tamahiki, Waihaha, 17/2/1887, TMB 7 p.72, 9/2/1887, SMB 4 p.290; Hitiri Te Paerata, Tauponuiatia West, 9/3/1886, TMB 4 p.330; Tini Waata, ibid. 10/3/1886, p.338; Te Papanui Tamahiki, Waihaha No. 3, 7/5/1897, TMB 11 p.324

[151] Te Oti Te Puke, Tauhara Middle Subdivision, 19/5/1886; SMB 4 p.19, TMB 5 p.403; Wi Maihi Maniapoto, ibid. 22/5/1886, TMB 6 pp.31,51, SMB 4 pp.38,51. See page 299 note 69 *supra*.

assertion that unauthorized use of a fishery would be met with the use of force to prevent a recurrence. These claims of the right to use force, or threaten its use, are found even in later cases, when the spread of Christianity might have been expected to have had an effect on traditional sanctions. However, no examples of force actually being used in the contact era were given to the Court.

At the fishing grounds in the north-east of the lake, the most contentious dealt with by the Land Court, the eventual grantees claimed such a regulatory right. Wī Maihi Maniapoto spoke of the length of time his people had used the fishery, then said:

> No one molests us in this work, should they do so they would be killed. Ihakara or his people never joined us in taking fish. I never knew they took fish themselves had I known it I should send them warning to desist on pain of being killed their places were on the other side where they had undoubted rights.[152]

He went on to say that Te Oti Te Puke and Ārama Karaka's knowledge of the names and locations of the fishing grounds came from hearsay, rather than because they had ever worked them.

On other occasions, the presumed 'owners' stated that they knew of others using what they regarded as their fishery, but had not responded because they had never actually caught the other party fishing. Hōhepa Tamamutu of Ngāti Te Rangiita said of one of the fisheries he regarded as under his control:

> ...the Ngatiraukawa used to come to get Kokopus from the Wakaroa, which at that time I considered to be mine. The dispute went on until the Ngatiraukawas migrated to Kapiti, ever since then I have been in possession. Hitiri and others only came occasionally for Kokopu. I never happened to see them so there was no dispute.[153]

In this case, Wakaroa lay in a disputed area and it may not have been politic for either party to press the issue by using force to back up their verbal claims of ownership and control. While not acknowledging any Ngāti Raukawa fishing right at Wakaroa, Hōhepa and Ngāti Te Rangiita may have found tacit acquiescence and looking the other way preferable to the risk of bloodshed.

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[152] Tauhara Middle Subdivision, 22/5/1886, SMB 4 pp.38,51, TMB 6 pp.31-32,50-51

[153] Oruanui, 11/4/1868, TMB 1 pp.56-57. See also page 301 *supra*.

The Lake Taupō fishery — a summary

The evidence presented to the Native Land Court in Taupō concerning fisheries and fishing rights suggests a number of conclusions about the nature of fishing rights in that area. It is clear that *take tupuna* or ancestral title was the basis for the vast majority of fishing rights exercised around Taupō. *Take tupuna* backed with *ahi kā* (ongoing occupation) was the form of title preferred by the Court, which would have encouraged people to present claims in these terms, but most people making such ancestral claims were able to give detailed accounts of the occupation of land and use of resources by named *tūpuna*. The key ancestors for large areas of land were usually members of the Ngāti Tūwharetoa migration, but some earlier ancestors associated with other tribes were also regarded as important, especially when it came to tracing unbroken occupation of the land.

Unlike many other areas such as Wairarapa Moana, conquest or the use of force was held to have played little part in the establishment of fishing rights. While there was considerable evidence of the battles fought in the establishment and consolidation of the Ngāti Tūwharetoa presence in Taupō, no-one spoke of force being used to establish or wrest a fishing right in the subsequent period, when Ngāti Tūwharetoa began a long era of uninterrupted occupation in the area. While some of those who claimed rights over particular fisheries said that they would be entitled to prevent encroachment on their rights with force if necessary, none actually gave examples of this being done.

Most fisheries were claimed by a hapū or a group of small, closely-related hapū, which is perhaps a natural corollary of the emphasis on the ancestral title to fisheries. In particular, claims to large fishing areas, as opposed to the smaller named fishing grounds which made up these areas, were almost always couched in terms of hapū 'ownership'. Similarly, rights in other general waterways such as rivers and streams were usually seen as being vested in hapū. The smaller fishing grounds tended to be associated with a particular sub-section of the claimant hapū. This smaller group could be defined in a number of ways. Where the people who used a particular fishery were named, they often turn out to be members of the same whānau or extended family. In other cases fisheries were strongly identified with particular settlements occupied by a section of the hapū (this too could be a whānau group). Rather than draw sharp distinctions between the type of right utilized by a hapū as compared with a whānau, it is more useful to

comment that the size of the user group was linked with the yield of the resource and the degree of control over the resource.

These difficulties of definition highlight the need to avoid rigid classification of fishing rights along hapū and whānau lines. The lines between small hapū and large whānau were always indistinct, and affiliations fluid. It may well be more useful to consider many of the fishing rights in Taupō as community rights, as many fisheries were strongly associated not only with a particular kin group, but also with a particular *kāinga* or fishing village. This view is reinforced by the connections made between settlements and a range of resources, not only fisheries. It would seem that residence in a particular settlement and affiliation to the appropriate kin group conferred a right to use the various resources of that community. This approach to fishing rights also allowed for the full seasonal exploitation of the fishery, as people were able to travel to the various residences of their kin groups and exercise their rights as a member of the community they chose to associate with at that point in time.

Within the formula of the hapū claim to the fisheries associated with the block being investigated by the Court, individuals frequently made claims to have a personal interest in particular fisheries. While hapū rights were often expressed in terms of 'ownership', personal rights were almost always expressed as a right to use a specific resource. Claimants to a personal right often spoke of the methods they used to catch the fish, such as the erection of a weir in a stream or the use of nets on a particular part of the lake. In doing so they connected their personal right strongly with the act of catching fish, rather than with deeper statements about connections between the waters, the lands, the hapū, and the iwi, which were often not spoken about in a forum such as the Native Land Court.

The balance of evidence suggests that this sort of usufructuary right, as routinely claimed by those who sought to establish personal interests in a fishery, also applied to larger fisheries used by larger groups. While the use of the language of ownership is commonplace in connection with the Taupō fisheries, much other evidence implies a usufructuary or occupationary right at hapū as well as personal level. No-one in the Court made an attempt to describe the difference between a 'greater' ownership right and a 'lesser' usufructuary right. From this it could be concluded that Taupō Māori saw their parcel of fishing rights as including the right to use and control the fishery, and the right to exclude others from it. The frequent use of the word 'ownership' in the Court context is more likely to refer to the ultimate right over a resource under

Māori customary tenure, rather than aspects of Western-style ownership such as alienation and exclusive individual rights.

CHAPTER EIGHT

The Whanganui River Fishery

'Here up the River.' Poutini tells me then,
'You have the sea as well if you have this river.'[1]

The Whanganui River district

According to legend, the Whanganui River[2] was created in the aftermath of the fight between the volcanoes Tongariro and Taranaki for the hand of the beautiful Pihanga. Taranaki lost the battle, and was exiled from his position between Tongariro and Ruapehu. In travelling to take up his current lonely position, Taranaki carved out the path of the Whanganui River and filled it with his tears, before proceeding along the coast to his present home. More prosaic scientists would have it that the river transverses an uplifted plateau of soft sedimentary rock, or papa, which was formerly sea bed. Water erodes this soft rock easily, and hence the river is generally muddy in appearance and flows in many places between very steep banks, especially in the gorge area above Pipiriki. The district is unstable, and has suffered a number of serious earthquakes since written records began — shocks in 1838, 1843, 1848 and 1855 caused major slips and fissures which affected the river flow. There are hot springs in places along the banks, and volcanic debris from the central plateau near the headwaters of the Whanganui has been washed down the river in great quantities.[3]

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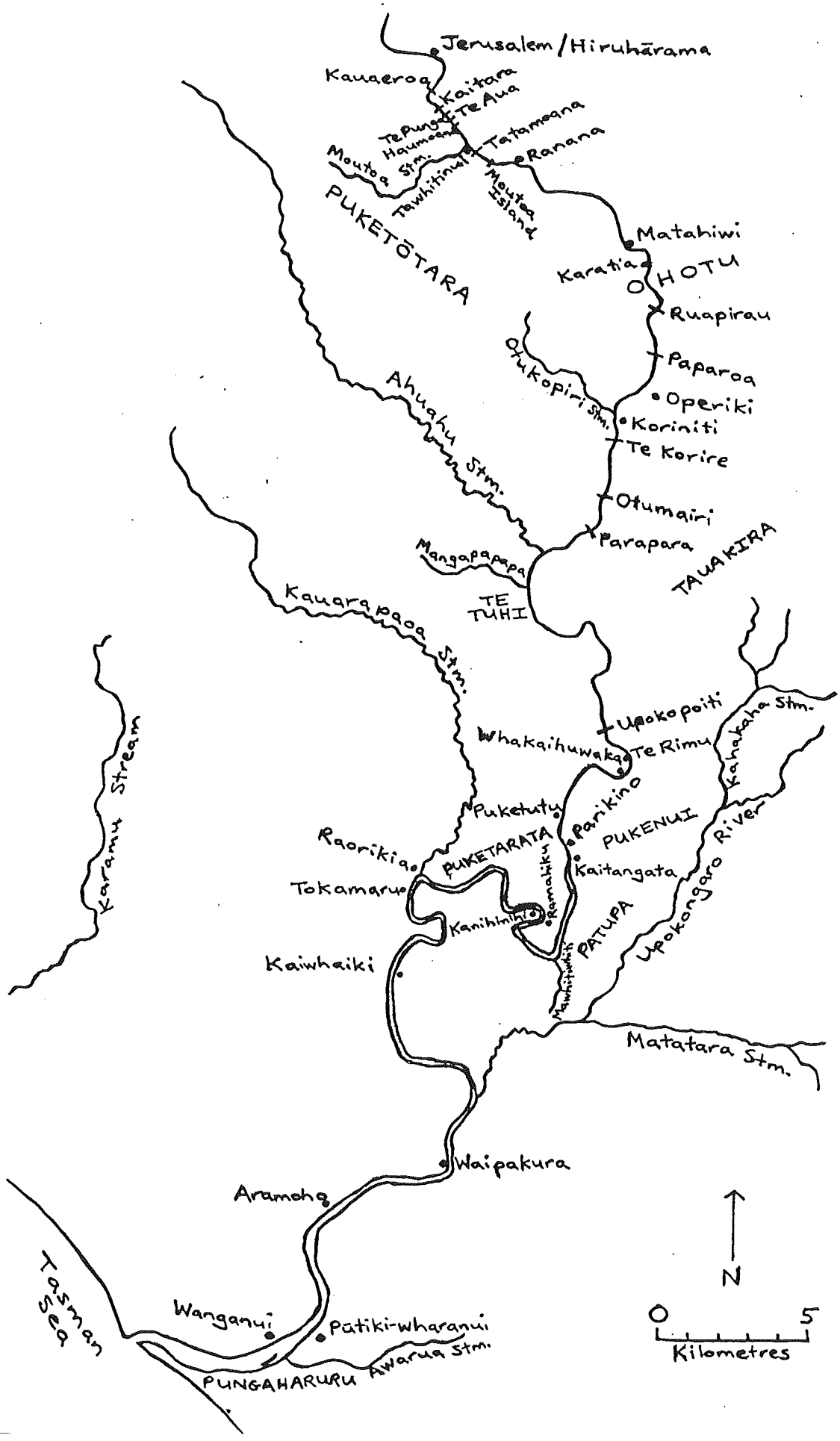
1 James K. Baxter 'Autumn Testament' in James K. Baxter Selected Poems Auckland: Oxford University Press, 1982, p.155

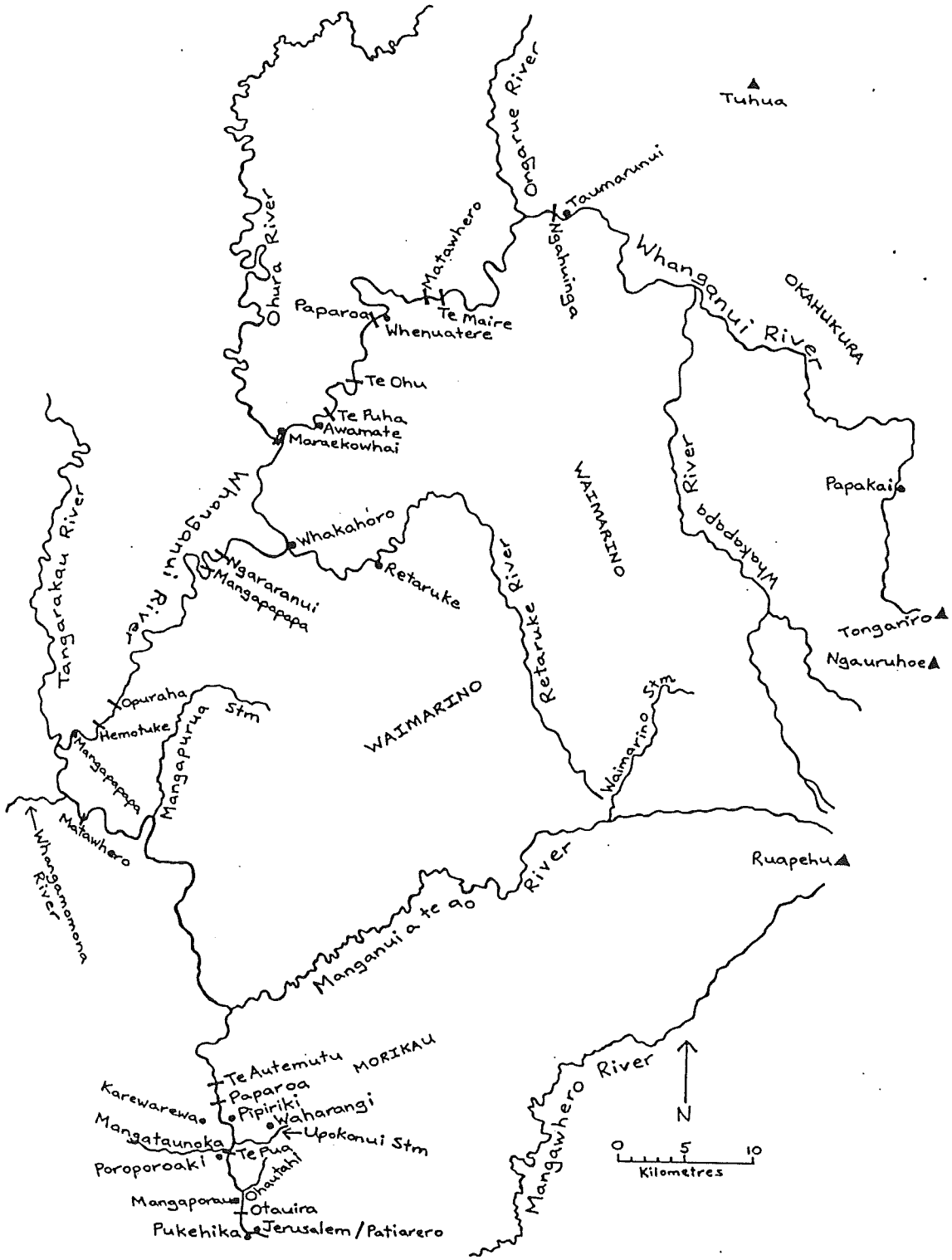
2 The name Whanganui/Wanganui has been subject to dual spelling by both Māori and Pākehā for over 150 years. The spelling Whanganui is preferred, although in the Māori dialect of the district this is pronounced with a glottal stop, as W'anganui. The National Geographic Board changed the name of the river from Wanganui to Whanganui in 1991, but the name of the city remains Wanganui. This spelling will be reserved for the city proper and for reference to institutions, documents etc. which use this spelling.

3 T.W. Downes Old Whanganui Hawera: W.A. Parkinson & Co., 1915, p.221; A.D. Mead Wanganui River Wellington: A.H. & A.W. Reed, 1957, pp.3,49; Kathy Ombler The Wanganui River: a scenic, historic and wilderness experience Wanganui: Wanganui River Reserves Board, [1981], pp.14,17,37; Maxwell J.G. Smart and Arthur P. Bates The Wanganui Story Wanganui: Wanganui Newspapers, 1972, p.20; Richard Taylor Te Ika a Maui, or New Zealand and its Inhabitants London: Wertheim and MacIntosh, 1855, pp.226-227,230

Map 4 a) **Lower Whanganui River**



Map 4 b) **The Upper Whanganui River**



The river rises on Tongariro and travels 290 kilometres to the sea. Major tributaries include the Tāngarākau, Whangamōmona, Ōhura, Ongarue and Whakapapa to the north and north-east, and the Manganuiateao, Retaruke and Upokongaro to the east. Numerous smaller rivers and streams also feed the Whanganui, giving it an extremely large catchment area of 7382 km^2. This large catchment area is responsible for great fluctuations in river levels, with variations of up to a hundredfold in water flows. The river has been known to rise nearly twenty metres in some of its narrower stretches during floods. The lower 30 km of the river is tidal, but only the bottom 16 km flows across a wide alluvial plain. It widens into a broad estuary for the last few kilometres. One of the major characteristics of the river is the numerous rapids found along most of its length, due to the drop of about 170 metres between Taumarunui and the sea. There are more than 240 named rapids on the river. In the 50 km below Taumarunui there are 90 rapids, while above Taumarunui the river rises steeply between fertile river terraces.[4]

Along most of its length the banks of the river were clad in thick bush and forest, with some larger trees such as rimu and tōtara. The immediate banks had been cleared in numerous places for settlements, cultivations, and groves of karaka (and later fruit) trees. The terraces of fertile land along the immediate margins of the river, and the cliff-tops in the gorge area, were lined with numerous *kāinga* and other settlements. The banks at the lower end of the river near the coast were regarded as less fertile and were not as heavily settled. As the river was navigable by canoe along most of its length, and it stretched from the coast well into the interior, it was an important line of communication. A well-established route from the coast to Taupō ran up the river and its tributary the Manganuiateao, the Ongarue gave access to the King Country and Waikato, and the Whangamōmona led to northern Taranaki.[5]

Before the arrival of the Pākehā, only the lowest stretch of the river was known as the Whanganui. Old names recorded for the river, or parts of it, include Te Awanui a Rua, Te Awanui a Tarawera, Te Wainui a Rua, Te Wainui a Tarawera, Te Wai-Tahu-parae and Te

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4 R.H. Clark New Zealand from the Road: Landforms of the North Island Auckland: Heinemann Reed, 1989, pp.137-138; T.W. Downes History of and Guide to the Wanganui River Wanganui: Wanganui Herald Newspaper Company, 1921, p.4; A.D. Mead The Naming of the Wanganui River Rapids Wellington: I.E. Coulter, 1977, pp.1,15; Mead Wanganui River, pp.8,12; Ombler, pp.35,37

5 L.J.B. Chapple and H.C. Veitch Wanganui Hawera: Hawera Star Publishing Co., 1939, pp.6-7; Downes History and Guide, pp.8-13; Downes Old Whanganui, pp.180-181; Mead The Naming of the ... Rapids, p.15; Ombler, pp.20,24-26,42; Edward Jerningham Wakefield Adventure in New Zealand from 1839 to 1844 Christchurch: Whitcombe and Tombs, 1908, p.359

Koura-puta-roa.[6] The river was home to a number of taniwha and *ngārara* (giant reptiles or monsters), the most famous of whom was Tūtaeporoporo, who lived in the river where it now flows through the city. Others include Tūtangatakino, who came from Hawaiki, at Te Ohu and Ngāraranui; Otarahuru, who lived at Ruapirau; and Mangapuera at Ahuahu. Local historian and Wanganui River Trust Board employee T.W. Downes wrote that as late as 1904 a Māori fisherman had a narrow escape from the *ngārara* Okuaurei at the Mangapurua Stream.[7]

The Whanganui River fishery

As the Whanganui River and its tributaries range from a broad mouth harbour area, with an extensive tidal zone, up to rapid mountain torrents, a wide range of freshwater species are present in its waters. Unlike Wairarapa, which relies largely on the eel fishery, and the Taupō fishery, which was based upon the kōkopu and its juvenile inanga form, no single species dominates the Whanganui fishery. While the eel occupies a very important place, other species were also taken in considerable numbers. At the river mouth, there was a flourishing kahawai fishery which was utilized as the fish entered the brackish river mouth waters in the summer months. Further upstream, a substantial number of weirs were built to catch piharau (lampreys) as well as eels. There were also a number of other species caught by smaller scale and lower technology methods. The surrounding forests and mild climate in the area also allowed for extensive kūmara cultivation, the capture of birds and rats, and the gathering of forest produce such as berries and fern root. According to the anthropologist Raymond Firth, these forest products were the mainstay of the Whanganui economy, supplemented by fishing, but others have said that the eel was the staple item in the Whanganui diet.[8] Certainly, instances of the use of *pā*

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6 Elsdon Best 'Miscellaneous Notes (Wanganui)' Alexander Turnbull Library MS-Papers 1187:37, folder 37j; M.J.G. Smart 'Te Awa Nui a Rua' in 'Speeches and Articles', ATL MS-Papers 1008:4; Rangi Pōkiha quoted in M.J.G. Smart 'Notes on Koriniti, Wanganui River' ATL MS-Papers 1008:16. The missionary Richard Taylor said that the *whakatauākī* 'te kōura puta noa' referred to the Whanganui people — "though the legs [of the crayfish] may be pulled off, [it] escapes amongst the stones; so the Wanganui natives cannot be taken." Taylor Te Ika a Maui, p.146

7 Downes History and Guide, pp.16-18,31,38,80; Downes Old Whanganui, pp.3,12-15

8 Raymond Firth Economics of the New Zealand Maori Wellington: Government Printer, 1989, p.68; Ombler, p.42; M.J.G. Smart 'Maoris in the Wanganui Valley' in 'Speeches and Articles' ATL MS-Papers 1008:5, p.1

tuna and *utu piharau* (eel and lamprey weirs) overwhelmingly dominated the fisheries evidence given to the Native Land Court in the nineteenth century in Whanganui.

Eels were the most important of the food fish of the Whanganui, and were caught mostly by means of large weirs, called *pā tuna* or *pā auroa*, although in some places they were caught using other fishing methods. The Whanganui weirs were unlike the *pā tuna* found in most other parts of the country, as they were built nearly parallel to the current rather than across it. This was because of the variable and often heavy water flows in the rapids of the river, where these weirs were built. They were extremely strong, and had been in use for centuries on the river — Downes recorded an example of the use of a *pā tuna* in about the sixteenth century.[9] Before Pākehā began clearing the river channel for navigation, there were about 350 *pā tuna* on the river. In 1938, Wharawhara Topine told the Native Land Court of fifty separate *pā tuna* in thirty rapids between Opurahi and Taumarunui. Only a few of the weirs survived into the twentieth century, with two at Pipiriki still being used in the 1980s. Eels are now more commonly taken by *hīnaki* (eel pot) alone, or by spearing or groping.[10]

The eels were caught in huge numbers during their autumn migration to the sea, when the run might only last for a few days. Downes saw over 150 kg of eels taken from two *hīnaki* alone in one night at Kaiwhaiki in 1907. He said up to half a ton a night could be taken from a single weir. The eels could be preserved and stored for later consumption, or kept alive in storage corves in the water.[11] Eel fry or tunariki were also caught in the river as they migrated upstream from the sea. One of the favourite fishing spots for tunariki was near the mouth of the Ōhura River, which passed over waterfalls before entering the Whanganui. The tunariki were trapped in

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9 Evidence of Menehira Wahiawa, Mangaporau Hearing, 30/7/1877, Whanganui Native Land Court Minute Book [MB] 1F, p.255; Atarea Taiwhati, Tawhitinui, 29/5/1900, MB 45 p.25; Rangiwakateka, ibid. 17/7/1900, pp.344,375; T.W. Downes 'Notes on Eels and Eel-Weirs' TPNZI 50 (1917): 296-316, *passim*; Downes Old Whanganui, p.51. See pages 160-161 *supra*.

10 Wharawhara Topine, Whanganui River Bed, 3/11/1938, MB 99 pp.262-264; Mr. Spratt (Counsel for Whanganui Tribe), Royal Commission in Respect of Claims to the Wanganui River: Proceedings, Maori Affairs Dept file MA 100/1, National Archives, pp.P.2,Q.1; Arthur P. Bates A Pictorial History of the Wanganui River Wanganui: Wanganui Newspapers, 1986, p.34; Downes 'Notes on Eels', p.314; Anonymous 'Access courses seek to preserve traditional fishing skills' Whanganui River Annual 1990: 38; Julie Ranginui 'The fish we were able to catch formed the major part of our diet' ibid.: 34-35, p.34; David Young 'Eel Weirs v River Steamers' ibid.: 36

11 Elsdon Best Fishing Methods and Devices of the Maori Wellington: Dominion Museum, 1929, pp.164-165; Elsdon Best 'A Maori Korotete or Corf' NZJST 6 (1923): 118-119; Downes History and Guide, p.48; Downes 'Notes on Eels', pp.298-302

bundles of fern or simply swept off the rock face as they climbed the falls. People travelled from as far afield as Taumarunui and Pipiriki to use this fishery.[12]

Piharau or lamprey were another important food source, which were caught in late autumn and winter as they travelled upriver to spawn. Weirs or *utu piharau* were used to catch lamprey also, but these were built perpendicular to the banks as the lamprey travelled close to shore.[13] While not as prevalent as *pā tuna*, there were nearly a hundred *utu piharau* in the river in the nineteenth century. These weirs fared better than *pā tuna* because they did not obstruct navigation to the same extent, and they continue to be built. There were notable examples at Jerusalem and Parikino in the 1920s, and 8000 lamprey were taken in one night from the Parikino weir. In 1990 there were six surviving weirs, four at Pipiriki, one at Matahiwi and one at Upokopoiti. The lamprey were caught mostly in the lower and middle reaches of the river, as they became unpalatable further upstream.[14]

Other fish were caught in lesser numbers, or in particular areas of the river. Amongst the fish taken in the upper stretches were the upokororo or grayling (now presumed extinct), which was caught in autumn. Some species, including kōkopu, inanga, smelt, and toitoi, were taken largely as a by-catch of the eel fishery. When caught deliberately, these could be taken in large numbers, as witnessed by Gilbert Mair in 1879, when he saw a mixed catch of about 350 kg taken from a weir at Whenuatere. Shoals of smelt were also caught in channels dug into the gravel of the riverbed in winter and spring, a fishery which is continued around Pipiriki. Adult and partly-grown inanga were taken up and down the river in a similar way, or were netted from canoes. Kōura were found in a number of side streams, and taken mostly by hand. Flounder were common in the lower stretches of the river, and were speared or netted.[15]

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[12] Downes History and Guide, p.19; Downes 'Notes on Eels', p.303; Ombler, p.104. See page 383 *infra*.

[13] See pages 161-162 *supra*.

[14] Mr. Spratt, Commission Proceedings, p.P.2; Best Fishing Methods, pp.189,212; Elsdon Best The *Utu piharau*, or Lamprey-weir, as constructed on the Whanganui River Wellington: Government Printer, 1924, pp.25-27,30; Downes 'Notes on Eels', p.306; Titapu Henare 'A fisherman's evidence' Whanganui River Annual 1990: 38; Gilbert Mair 'Notes on Fishes in Upper Whanganui River' TPNZI 12 (1879): 315-316, p.316; Ombler, p.41; Richard Taylor 'Journals' ATL qMS 1985-1990, vol. 2, 27/10/1843; P.R. Todd 'Wanganui Lamprey Fishery' Freshwater Catch 6(2) (1979): 19-20, p.20

[15] Hekenui Whakarake, Whanganui River Bed, 3/11/1938, MB 99 pp.256-257; Wharawhara Topine, ibid. pp.259-262; Hekenui Whakarake, Commission Proceedings, pp.U.5-U.6; 'Access courses', p.39; Anonymous 'Inanga (Whitebait)' Whanganui River Annual 1990: 38; Best Fishing Methods, pp.212-213; Downes 'Notes on Eels', pp.306-307; Norm Hubbard 'The Wanganui Smelt Fishery' Freshwater Catch 4 (1979): 10-11; Mair 'Notes on Fishes in Upper Whanganui', pp.315-316; Ombler, p.32; Ranginui, pp.34-35; Taylor 'Journals', vol. 5, 30/10/1848

The kahawai fishery at the mouth of the river was solely a summer operation. There was little if no permanent settlement there, but Māori travelled down from various places upriver to form temporary villages on the river banks near the mouth. Fleets of canoes went out from these villages into the estuary to troll for the kahawai, which were then dried for winter use. Summer was the least fruitful season in the rest of the river fishery, as water levels were generally low. The summer months were also used to catch and dry eels from the various lakes and swamps near the river mouth.[16]

Māori occupation and control of the Whanganui River valley

The first visitor to the Whanganui River was the great Polynesian navigator Kupe, but the earliest permanent settlers at Whanganui were the Ngā Paerangi people, descended from the pre-Fleet ancestor Paerangi o te Maungaroa, who occupied the lower part of the river. Genealogy places their arrival at *circa* A.D. 1100. They formed the tāngata whenua population of the region, and were largely absorbed by later groups which traced their whakapapa from Fleet ancestors, although many major hapū and iwi (including the upriver Ngāti Hāuā) continued to acknowledge lines of descent from these tāngata whenua ancestors.[17] The first man said to have travelled the full length of the river was the explorer Tamatea-pōkai-whenua. He found a settlement at Pūtiki-wharanui, near the river mouth, under the leadership of the *rangatira* Tarinuku.[18]

About the same time as Tamatea's visit, people of the Aotea *waka* settled permanently at Whanganui, spreading outward from Pātea under their leader, Turi. They became known as

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[16] Hoani Tumango, Kaitangata, 7/5/1895, MB 25 p.28; Bates, p.200; Best Fishing Methods, pp.40-42; M.J.G. Smart 'Notes (Putiki)' ATL MS-Papers 1008:11; Smart & Bates, p.35; Wakefield, p.178. See page 383 *infra*.

[17] Mere Hato, Puketarata Subdivision, 22/3/1889, MB 15 pp.102-103; Karehana Tahau, ibid. 27/3/1889, p.113; Wikirini Te Tua, Tawhitinui, 4/12/1900, MB 46, p.302; Mr. Spratt, Commission Proceedings, p.C.2; Downes History and Guide, p.68; Downes Old Whanganui, pp.1-3; Mead Wanganui River, p.7; Ombler, p.40; Smart 'Te Awa Nui a Rua', p.1; S. Percy Smith 'Some Whanganui Historical Notes' JPS 14 (1905): 131-158, pp.131-132,152. While Downes' work contains a great deal of detail concerning the history of the Whanganui, like many written tribal histories of the early and mid-twentieth century it concentrates heavily on warfare and conflict, and the exploits of chiefs and heroes, ignoring day-to-day life and periods of peace. He gained his information through his work with the River Trust, and as Supervisor of River Works from 1921, he worked closely with Māori river gangs, and obtained much of his knowledge from them. Robert D. Campbell Rapids and Riverboats on the Wanganui River Wanganui: Wanganui Newspapers, 1990, p.193

[18] Bates, p.11; Best 'Miscellaneous Notes', folder 37c; Downes Old Whanganui, pp.6-11; Mead Wanganui River, p.7

Te Āti Haunui-a-Paparangi (also known as Te Āti Hau, or Ngāti Hau), and spread to inhabit most of the Whanganui River Valley. This name covers most of the people of the Whanganui River, who are sometimes also referred to as the Whanganui tribe. They take their name from Haunui-a-Paparangi, who came with Turi on Aotea. The Whanganui tribes also claim ancestry from some crew members of the Kurahaupō *waka*, especially Haupipi, another source of the name Te Āti Hau.[19] Te Āti Haunui-a-Paparangi are not the only major tribal group with an interest in the Whanganui River. The headwaters lie in the Ngāti Tūwharetoa *rohe*, and many of the upper river hapū belong to both iwi. To the west are Ngāti Ruanui and Ngārauru, whose lands lie close to the river; Ngāti Apa live to the east; and Ngāti Maniapoto live on the north-western tributaries.[20]

The Te Āti Haunui-a-Paparangi chief Tamakehu and his first wife Ruaka, who lived some time around the mid-seventeenth century, assumed an important role in the relationship of the Whanganui people to the river. From the time of their children, the river people were divided into three sections. The upriver people, from the headwaters to Retaruke, came under their daughter Hinengākau, who was married to a man of Ngāti Tūwharetoa. The middle section, from Retaruke to Rānana, was under the eldest son Tamaupoko, and the section from Rānana to the sea was under the youngest son Tūpoho. This ancestral division is the origin of the *whakatauākī* 'te taura whiti a Hinengākau', or 'the plaited rope of Hinengākau', which refers to the combination of the usually disparate Whanganui peoples at times of external threat, bound together as they are by the common link of the river. This ancestral division applies more to the river than to the lands on its banks. Tamakehu was frequently put forward to the Native Land Court as an ancestor on the land, and Hekenui Whakarake described Tamakehu in 1938 as "the great ancestor of the Wanganui people". However, these three of his children were mentioned only in whakapapa, and not as *pūtake* from whom land rights are derived. The descendants of Tamakehu and Ruaka around Rānana are known as Ngāti Ruaka.[21]

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[19] Bates, p.12; Best 'Miscellaneous Notes', folders 37a & 37j; Downes Old Whanganui, pp.2-4; Smart 'Te Awa Nui a Rua', pp.2-3; Smith, pp.131-132

[20] Hekenui Whakarake, Commission Proceedings, pp.S.4,W.7; Mead Wanganui River, p.7; Ombler, pp.99-100; Smart & Bates, p.19. In the Whanganui River Bed hearing, Māui Rangihaeata of Pātea gave his iwi as Ngāti Ruanui, Whanganui, Ngārauru, and Ngāti Apa — 19/5/1939, MB 100 p.204

[21] Rini Hemoata, Mangaporau, 31/7/1877, MB 1F p.262; Neri Te Kapua, ibid. pp.264-265; Raihania Takapa, Morikau, 18/1/1899, MB 39 pp.299-300,306-307; Wi Pauro, ibid. 20/1/1899, pp.321-322; Pene Te Rangihauku, Tawhitinui, 16/5/1900, MB 44 p.318; Hekenui Whakarake, Whanganui River Bed, 3/11/1938,

The metaphor of the woven rope is an appropriate one for the Whanganui peoples. The relatively clear distinction between the iwi and its constituent parts, as seen in Wairarapa and Taupō, is not equally apparent in Whanganui. While Te Āti Haunui-a-Paparangi is the name now used for 'the' Whanganui iwi, a number of its subdivisions are known variously as iwi or hapū, depending on context or the speaker. The inter-relationships between the various neighbouring iwi and many major Te Āti Haunui-a-Paparangi hapū add an extra level of complexity to tribal relationships in the area. This may be a reflection of the importance of the Whanganui River in the traditional Māori communications network, and the consequent mobility of the population in the river valley. It is also indicative of the large population in the valley before the arrival of the Pākehā. In the 1840s the missionary Richard Taylor counted over 2200 Māori living on the banks of the river as far up as Pipiriki, with Pukehika pā alone having over 500 inhabitants. When the tributaries and upper river were taken into account, he raised his population estimate to 5600, 600 more than the figure reached by his predecessor John Mason. It is likely that the population would have been even higher in the eighteenth century, as Whanganui was badly affected the *rewharewha* or great epidemic of *circa* 1800 and other detrimental effects of contact with Europeans.[22]

When the Māori claim for ownership of the bed of the Whanganui River was put to a Royal Commission of Enquiry in 1950, a list was given of twelve interested hapū which lived along the river, all descended from the three river ancestors. They were Ngāti Hāuā, Ngāti Pekeatūroa, Ngāti Kura, Ngāti Hau, Ngāti Ruaka, Ngā Poutama, Ngāti Pamoana, Ngāti Tūwera, Ngā Paerangi, Ngāti Tūpoho, Ngāti Rangi and Ngāti Uenuku.[23] Some of these hapū (such as

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MB 99 pp.257-258, Wharawhara Topine, ibid. 4/11/1938, pp.265-266; Hekenui Whakarake, Commission Proceedings, pp.R.1-R.2; Titi Tihu, ibid. pp.Y.4-Z.1; Closing Submissions of Counsel for Claimants, Whanganui River Claims, Waitangi Tribunal document Wai 167 #D-18, pp.13-14; Downes Old Whanganui, pp.31,46-49; Ombler, pp.40,95; Smart 'Notes on Koriniti'

[22] Rev. Richard Taylor 'Papers', ATL MS-Papers 0254:3; James Belich Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century Auckland: Allen Lane/The Penguin Press, 1996, pp.94-95; L.J.B. Chapple and H.C. Veitch Sidelights on Wanganui History Wanganui: Wanganui Herald Newspaper Co., 1940, p.19; Chapple & Veitch Wanganui, pp.6-8; Downes History and Guide, p.27; Downes Old Whanganui, pp.89-90; A.D. Mead Richard Taylor Missionary Tramper Wellington: A.H. & A.W. Reed, 1966, p.185; Janet Murray 'A Missionary in Action: The Rev. Richard Taylor and Christianity among the Wanganui Maoris in the 1840s and early 1850s' in Peter Munz (ed.) The Feel of Truth Wellington: A.H. & A.W. Reed, 1969, p.198. See pages 17-18 *supra* on the blurred lines between hapū and iwi, and page 195 and note 48 *supra* on European influences on Māori population decline.

[23] Hekenui Whakarake, Commission Proceedings, p.R.2; Titi Tihu, ibid. pp.Y.4-Y.5

Ngāti Ruaka and Ngāti Tūwera), as well as others not included in the 1950 list, were described occasionally in the Native Land Court as 'iwi' or 'tribes', with constituent hapū of their own.[24] Regardless of whether these groups are considered as hapū or iwi, when all their constituent parts bearing hapū names are taken into account the number of hapū on the Whanganui runs into dozens or even hundreds.[25]

There were also a great number of hapū discussed in an historical context in the Native Land Court that no longer existed at the time of hearing. Hapū names changed over time as more recent ancestors and kinship connections became more important than older ones. For example, Hoani Tumango of Ngāti Hinearo, who claimed the Kaitangata block by descent from Hinearo and Rangiwhangongo, said of the descendants of the intermarriage of these two groups: "N[gati] Hine was formerly the name of the desc[endants] of Whangongo & Wharekaikuia but after the marriage of Puni te ari [Rangiwhangongo's child] the Whangongo people became N. Hinearo."[26] The adoption of the Ngāti Hinearo name reflected the new associations of Rangiwhangongo's descendants in that particular area.

The major hapū groups lived in different general areas along the river banks, although boundaries were often unclear and neighbouring hapū were usually closely related. People appearing for smaller hapū in the Court often stated that their hapū belonged to one or more of the larger hapū. In the early to mid-nineteenth century, the Whanganui people were distributed roughly as follows. Working from the river mouth upstream, Ngā Paerangi were around Aramoho, Upokongaro, Kaiwhaiki, and Kanihinihi; Ngāti Rongomaitāwhiri were around Raorikia; Ngā Poutama were around Pungarehu and Parikino, and also further north around Matahiwi and Karatia; Ngāti Pamoana were around Koriniti and Operiki; Ngāti Ruaka were around Rānana, Tawhitinui and Kauaeroa; Ngāti Hau were around Hiruhārama (Jerusalem, formerly Patiarero)

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[24] Ngāti Ruaka: Te Poari Kuramate, Whataroa, 17/8/1869, MB 1C p.279; Epiha Patapu, ibid. 18/8/1869, p.287; Eruini Rangiirikau, Tawhitinui, 23/11/1900, MB 46 p.229. Ngāti Tūwera: Ratana Te Urumingi, Pourewa, 17/8/1869, MB 1C p.280, 18/8/1869, p.290. Ngāti Rongomaitāwhiri: Judgment (Judge T.H. Smith), Tokamaru, 4/3/1876, MB 1F p.22; Roihi Poaka, Puketarata Subdivision, 26/3/1889, MB 15 p.108. Ngā Paerangi: Tokamaru Judgment, op. cit.; Mere Hato, Puketarata Subdivision, 22/3/1889, MB 15 p.102; Hoari Ngapo, ibid. 26/3/1889, p.106. Ngā Wairiki: Tokamaru Judgment, op. cit. See also 'Return Giving the Names of the Tribes of the North Island, etc.' AJHR 1870 A-11, pp.8-9

[25] Downes gave an "incomplete list" of 54 Whanganui hapū, and Smart also made a "partial list" of 53 "hapus" and "sub-tribes", which contained many hapū not included in Downes' list. Downes Old Whanganui, pp.163-164; Smart 'Notes (Putiki)'.

[26] Hoani Tumango, Kaitangata, 8/5/1895, MB 25 pp.20-24,50-51; see also page 361 *infra.*

and Pipiriki; Ngāti Patutokotoko were around Pipiriki, Kirikiriroa and Manganuiateao; Ngāti Hāuā-te-rangi (usually considered an iwi in their own right, also called Ngāti Hāuā) were around Whakahoro, and Taumarunui (there alongside Ngāti Huinga); and Ngāti Pēhi were on the uppermost reaches, near Taupō.[27]

The nature of the relationships between the various major hapū of the Whanganui area can be seen from the history of conflict in the area in the early and mid-nineteenth century. At the time of the *rewharewha*, around 1800, Ngāti Rongomaitāwhiri of Kauarapaoa was set upon by a *taua* from the headwaters, on its way to attack Ngāti Apa and Ngāti Kahungunu. After the attack, other downriver peoples including Ngā Paerangi, Ngāti Tumango, and Ngā Poutama gathered to assist Ngāti Rongomaitāwhiri, and attacked the *taua* at the river mouth. The *taua* was then given safe passage back upriver so long as it went peacefully. Such attacks by the upriver tribes on the lower reaches, and vice versa, were common.[28] Yet when external tribes attacked the river, the upriver and downriver tribes acted together. About 1820, a northern *taua* under Te Rauparaha, Rangihaeata and Tūwhare attacked the Whanganui people near the river mouth. Te Rauparaha also attacked Whanganui on later occasions, and he was frequently resisted by the whole of the Whanganui peoples. The passage of the Tama-te-uaua migration of Te Āti Awa in 1832 was also resisted by all of Whanganui, with the assistance of their Ngāti Tūwharetoa relatives.[29]

This pattern of behaviour, and the often uncomfortable relationship between the upriver and downriver tribes, was carried over into the early years of Pākehā settlement. During the wars of the 1860s the upriver and downriver peoples took different sides, for thoroughly Māori reasons. Some of the upriver people were adherents of the Pai Mārire faith, and they were included in a Hauhau force which tried to advance down the river. The downriver people refused them passage, and a major battle took place at Moutoa Island, between Tawhitinui and Rānana, in May 1864. The downriver peoples were successful in preventing the passage of the Hauhau

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[27] 'Approximate Census of the Maori Population' AJHR 1874 G-7, pp.16-17; Ernest Barns Little journeys into the lives of notable Maori chiefs and chieftainesses of the Whanganui district Wanganui: The Alexander Museum, 1937, p.9; Best 'Miscellaneous Notes', folder 37j; Lt. Col. Gudgeon 'Mana Tangata' JPS 14 (1905):49-66, p.59; Ombler, pp.95-96,100; 'Hemi Topine Te Mamaku' in The People of Many Peaks Wellington: Bridget Williams Books & Department of Internal Affairs, 1991, pp.207-209; Wakefield, p.276

[28] Downes Old Whanganui, pp.89-92,105-106,134; Ombler, p.70

[29] Chapple & Veitch Wanganui, pp.10-12; Downes Old Whanganui, pp.109-110,119-125,130-134,138-155

forces. There were however some families and hapū which were divided by this conflict. The downriver people have been described as 'Kūpapa' or Government loyalists for their role in this encounter, but in this case this is misleading. It was more important to them to protect the mana of the river, and their own mana and autonomy, by not allowing others to pass down their stretch of the river without permission. This battle reflected the ongoing determination of the Whanganui people to control their river.[30]

Pākehā appropriation of control of the Whanganui fishery

While the earliest effects of Pākehā contact began in the late eighteenth century, with the arrival of epidemic disease, direct Pākehā influence on Māori control of the river did not begin until Pākehā missionaries and the New Zealand Company arrived there in 1840. New Zealand Company influence was replaced by the extension of government authority from the mid 1840s onwards. In the mid to late 1840s, government efforts in the area were directed towards protecting the physical safety and property rights of the Wanganui township settlers. This was achieved both by negotiating with Māori for land purchases, and by garrisoning troops in the town. This military influence was also pronounced in the 1860s, when there was fighting between Crown and Hauhau forces in the area. From the mid-1860s onwards, the extension of government authority up the river took two different forms. Direct acts on the ground, such as the clearing of the river rapids to facilitate steamboat travel and 'development' of the upper river, had an immediate and devastating effect on traditional Māori fisheries and Māori ability to control the river. The more insidious extension of Crown control came through the imposition of a Pākehā legal system. The Native Land Court first sat in Whanganui in 1866; the investigation of title to Māori land facilitated alienation to Pākehā buyers, and brought many upriver Māori into contact with the machinery of the state for the first time. Māori claims of ownership and control over the river were also taken to the courts in the twentieth century, but once again these cases had to be conducted within the constraints of the Pākehā legal system.

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[30] James Belich The New Zealand Wars and the Victorian Interpretation of Racial Conflict Auckland: Auckland University Press, 1986, pp.203-205,212; Chapple & Veitch Wanganui, pp.97-100; Gudgeon, pp.59-60; Ombler, pp.45-46

The earliest Pākehā settlers in Whanganui were the missionaries. Church Missionary Society minister Richard Mason came to Pūtiki-wharanui in 1840, and missionary influence began to spread up the river, more so when Mason's successor Rev. Richard Taylor made journeys up the river to Taupō from 1843. There was also a French Catholic mission at Hiruhārama (Jerusalem). The rapid outward adoption of Christianity did not prevent the frequent passage of *taua* up and down the river until the late 1840s, but when conversion did take place, it was often said to be in an effort to end this fighting.[31]

The arrival of the New Zealand Company in 1840 had a much greater direct impact on the lower stretches of the river, as the new settlement of Wanganui began to vie with local Māori for control of the lower river area. Edward Jerningham Wakefield, the nineteen-year-old son of Edward Gibbon Wakefield, was sent to make purchases on behalf of the Company. Wakefield negotiated principally with the leading chiefs Te Pēhi Tūroa of Ngāti Patutokotoko, Rangitauira (uncle of Wakefield's friend and adviser Kurukaanga) from Pipiriki, and [Hōri Kīngi] Te Anaua of Ngāti Ruaka, and purchased a poorly-defined area — he believed he had bought the entire district and river as far up as Tongariro — for £700 worth of trade goods (that being Wakefield's estimate; Rev. Mason's was £100). However, in return Wakefield was a given substantial amount of food, which he described as a "*homai no homai* ... a gift for a gift". This raises the question of how far Wakefield understood Māori custom, and whether the Whanganui chiefs intended to share the land rather than alienate it. Nevertheless, the new township on the western bank of the river brought increased trade to the area, especially to those Whanganui Māori living on their remaining lands across the river at Pūtiki.[32]

The purchase was quickly repudiated by a number of Whanganui chiefs. The situation at the river mouth was complicated because in the past the land had been used by hapū from the whole river. The upriver tribes remained dissatisfied with the purchase, while the downriver people, especially those now living at Pūtiki, became increasingly reluctant to drive away the

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[31] Chapple & Veitch Wanganui, pp.17-19; Downes Old Whanganui, pp.167-172,178-179; Murray, pp.198-202; Wakefield, pp.192-193,443; Ian Wards The Shadow of the Land: a study of British policy and racial conflict in New Zealand 1832-1852 Wellington: Historical Publications Branch, Department of Internal Affairs, 1968, pp.313-316

[32] Downes Old Whanganui, pp.179-195, 'Hori Kingi Te Anaua', PMP p.152; 'Te Peehi Turoa', ibid. pp.345-346; Claudia Orange The Treaty of Waitangi Wellington: Allen & Unwin, 1987, pp.72-73; M.J.G. Smart 'Wanganui Dates and Notes' ATL MS-Papers 1008:17; Wakefield, pp.175-179,203-211; Wards, pp. 303-305. Wakefield's account of his time in Whanganui, while highly entertaining, is less than reliable on some aspects. In particular he was unfairly critical of the missionaries, and appears to have over-emphasized Māori understanding of the terms of the purchase.

Pākehā who had settled and traded among them. Settlers found it difficult to take up the land promised to them by the New Zealand Company, and growing tensions in the district led to the arrival of government authority in 1843, when the purchase was among those investigated by Land Claims Commissioner Spain. Sub-Protector of Aborigines George Clarke Jnr then confined the Company's purchase to the area around the lower river reaches, and made a number of fishing reserves in the block. This restricted Pākehā control over the river valley, and was also a recognition of the great importance of the Whanganui River fisheries to local Māori.[33] However, dissatisfaction over the level of payment and the extent of reserves continued to grow, especially among the upriver people, and in 1847 the town was besieged by a *taua* consisting of some upriver people under Te Mamaku, Maketū, Ngapara, and Pēhi Tūroa, and some of their down-river relatives. The Pūtiki people mostly remained neutral, not wishing to fight their relatives or their neighbours, and after a brief fight with the garrison the *taua* dispersed.[34]

The Whanganui purchase was then re-negotiated in full in 1848 by Governor Grey and Donald McLean. The deed finally signed in May 1848 conveyed just over 80 000 acres around the lower river (twice the size of Clarke's block), at a price of £1000. The sale moneys were divided up amongst the 22 hapū and bordering iwi by Hōri Kīngi Te Anaua. The deed specifically included rivers and streams in the sold portion, but the reserves made at the time of sale also included a number of "eel and inanga cuts" and "streams for fishing eels". Many of the other reserves included a stretch of stream or river frontage. The upstream boundary was at Raorikia, which was also the end of the tidal zone of the river.[35]

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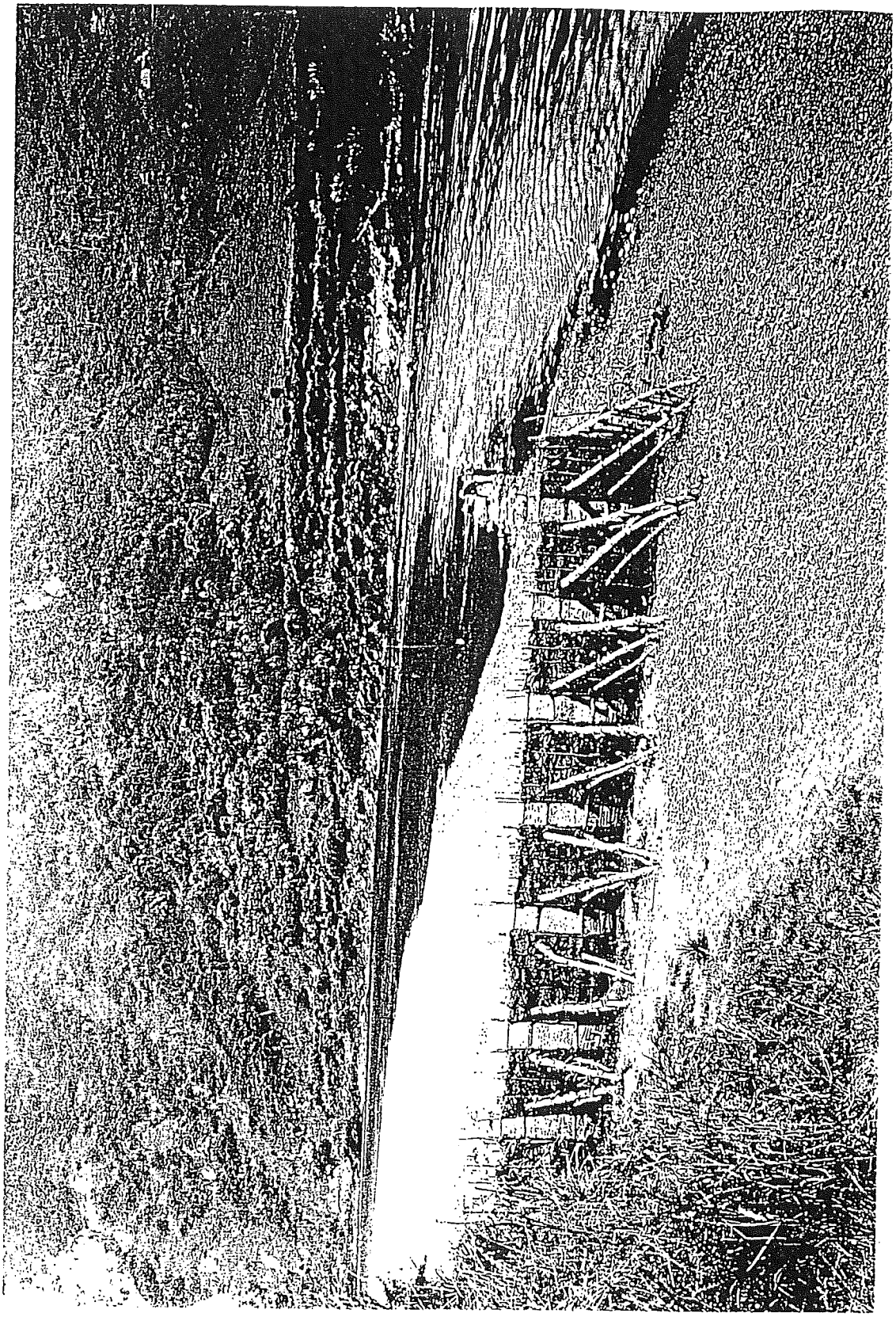
[33] Downes Old Whanganui, pp.207-221,223-227; Orange, p.187; Wakefield, pp.443,558-590; Wards, pp.305-309, 311-312

[34] Hakaraia Korako, Pungaharuru, 15/8/1888, MB 13 p.358; Downes Old Whanganui, pp.227-240,254-284,291-315; Murray, pp.199-202; Wards, pp.317-348

[35] Judgment (Judges Ward and Scannell), Pungaharuru No. 3, 31/8/1888, MB 13 p.424; Taylor 'Journals', vol. 5, 15/1/1848, 25/5/1848, 29/5/1848; Mr. Spratt, Commission Proceedings, p.C.2; Downes Old Whanganui, pp.315-332

Fig. 7 ***Utu piharau*** **(lamprey weir), Parikino, Whanganui River, c.1890s**
Utu piharau are built on the river bed while waters are low, then come into use as the river rises in winter.
Photograph: Harding Denton Collection, courtesy of the Alexander Turnbull Library, Wellington, New Zealand, ref. G 483 ¼



The purchase of the river mouth area in 1848 put it under Pākehā control, but there are many indications that Māori attempted to retain firm control of the rest of the Whanganui River in the mid to late nineteenth century, in the face of Crown efforts to extend its authority over them and the river. As there was only minimal Pākehā settlement above the tidal zone, the ability of the government to intrude directly upon the management of the river was severely impaired. While the fighting between the upriver and downriver people at Moutoa in 1864 was ostensibly a conflict between Crown and Māori authority, local Māori issues such as the mana of the river were more important.[36] Local historian Maxwell Smart recorded that when the new town bridge was opened in 1871, leading chief Mete Kīngi Paetahi refused to pay the toll on the grounds that the river had not been sold.[37]

Pākehā influence spread further upriver as land was sold there in the 1870s. In response, the famous *Kūpapa* military leader Te Keepa Rangihiwinui (also known as Major Kemp) tried to establish a land trust in 1880 to keep management of Māori land on the Whanganui in the hands of those who belonged to the land, and to control further sales and access. Carved posts were put up to mark the extent of the area, and almost all Pākehā were banned from the river above Tāngarākau. The lowest point of the trust lands on the river was at Kauarapaoa, no great distance from Wanganui, and the river itself was included almost to the headwaters. This scheme had some success, and slowed the passage of Whanganui land through the Native Land Court in the following years. However, the trust area was not observed by all Whanganui Māori, nor by the Crown. The government continued to purchase land bordering the river and extend its control over the river through legislation. Te Keepa maintained his opposition to land sales right up to his death in 1898, although his influence waned as he aged.[38]

Other direct Crown actions of the 1880s and 1890s also had implications for Māori control of the river, and by extension, the fisheries. The River Boards Act 1884 allowed for the establishment of River Boards to undertake flood protection works, taking land if necessary. By

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[36] See pages 341-342 *supra*.

[37] Smart 'Wanganui Dates and Notes'

[38] Kemp's Land Trust, Wanganui, Maori Affairs Dept. file MA 13/14, N.A.; Barns, pp.5-7; Belich Making Peoples, p.267; Ombler, pp.48-49; Ward, p.291. Te Keepa was a leading chief of both Te Āti Hau, through his mother Rere-o-Maki of Ngāti Ruaka and Ngāti Tūpoho (sister to Te Anaua and one of the few women to sign the Treaty of Waitangi), and of Muaupoko of Horowhenua through his father Tanguru-o-te-rangi. He was prominent in the wars against Hauhau, Te Kooti and Titokowaru, leading a Whanganui section of the Native Contingent in the later campaigns. He later held many official posts, and was a supporter of the Kotahitanga Māori unity movement in the late nineteenth century. 'Te Keepa Te Rangihiwinui' PMP, pp.246-250

1891 the Whanganui River was seen as a potential tourist attraction, and the Wanganui River Trust Act 1891 gave a Trust Board much wider powers over the river from Raorikia to near the source. Tourists travelled by steamboat, and the river works needed to make the river navigable necessitated the destruction of many *pā tuna* and *utu piharau*.[39]

Whanganui Māori did not object to steamers on the river *per se*, and for some time the steamers and weirs co-existed. At one point part of a *pā tuna* at Haumoana was washed away in a flood and returned by Ema Williams, who retrieved the post and freighted it back by steamer.[40] Whanganui Māori did however instantly and vociferously protest against the destruction of their fisheries. Clearance of the river for Pākehā navigation began in 1880, a channel was cleared as far as Pipiriki by 1892, and more weirs were destroyed in 1893. In 1894 the Premier, Richard Seddon, and James Carroll, the minister with responsibility for Native Affairs, came to the area to discuss the dispute, but said that river navigation must go ahead. The police had to be called to Rānana in 1895 and Te Autemutu in 1896 to allow the river gangs to clear weirs there. By the end of the century almost all the weirs had been removed or made ineffective by the placement of walls in the river. The demand for river travel was increased when the Main Trunk Line reached Taumarunui in 1903, and through travel from Auckland became possible.[41]

It was not only on the upper parts of the river that Crown actions were detrimental to Māori fishing rights. In the lower river, the Collector of Customs (who seems to have been responsible for the enforcement of fishery regulations) and the local Acclimatization Society sought to have action taken against Māori who were fishing for native species by traditional methods. Māori, who were claiming to fish under their Treaty of Waitangi rights, were using set nets to catch flounder, inanga and other fish, but the Pākehā officials believed that they were also

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[39] John Ballance, Premier and MHR for Wanganui, 3/9/1891, New Zealand Parliamentary Debates 1891 p.218; Hoani Taipua, MHR for Western Māori, ibid. p.220; 'Report of Royal Commission Appointed to Inquire into and Report on Claims made by Certain Maoris in Respect of the Wanganui River' AJHR 1950 G-2, p.13; Mr. Spratt, Commission Proceedings, p.E.1; Campbell, p.64

[40] Werahiko Atarea, Tawhitinui, 7/6/1900, MB 45 p.113

[41] Petition of Pauro Tutaawha and 66 others, 'Reports of the Native Affairs Committee' AJHR 1887 I-2, p.8; 'Annual Report on Department of Lands and Survey' AJHR 1899 C-1, Appendix 8 p.132; Reone Maungaroa, Whakaihuwaka Relative Interests, 10/5/1898, MB 37 p.293; Rangiwakateka, Tawhitinui, 17/7/1900, MB 45 p.345; Pita Te Rahui, ibid. 3/8/1900, MB 46 p.110; Parete Wereta, Whanganui River Bed, 4/11/1938, MB 99 p.266; Commission Report, p.19; Mr. Spratt, Commission Proceedings, p.Q.1; Titi Tihu, ibid. p.2A.1; Campbell, pp.51,61-67,124-125; Downes History and Guide, pp.2-4

catching trout. The use of anything other than hand-held whitebait nets was banned in the river in 1928, much to the annoyance of many Pākehā as well as Māori flounder fishers.[42]

Practical policy such as the banning of traditional fishing equipment had a great impact on Māori fishing rights in the Whanganui River, but the arrival of the Native Land Court in the district had an even wider effect. The Pākehā legal system was the means by which the extension of state authority was achieved over the upper parts of the river, as the granting of a Crown-derived title made land available for alienation to settlers or the Crown. Almost all of the river bank land had passed through the Court by 1901 (although the Tauakira block to the east of the river was not investigated until the 1920s), but the Pākehā legal system continued to have a considerable effect on Māori attempts to retain control over the river and its fisheries. In the face of the continued undermining of their rights, Whanganui Māori took their claim to own the river back to the Native Land Court in 1938, and this case continued to be fought through the justice system until the 1960s.

Fishing rights were routinely included in claims made to the Native Land Court, which first sat at Wanganui in 1866. It investigated title to a number of smallish blocks along the lower stretches of the river from Rānana downstream, under Judge Thomas Smith from 1866 to the mid 1870s. The legislation under which most of these cases were heard required that a maximum of ten owners be named for each block, and so cases were often argued very generally and discussion of fisheries did not feature in the judgments handed down. One exception was on the 44 acre block of Pourewa, where Ratana Te Urumingi's discussion of his family's fishing rights was almost the only evidence given of the use of the land.[43] From about 1877 onwards, much larger blocks further up the river began to pass through the Court, which sat under a variety of judges for the next decade. Judge Heale recognized the importance of fisheries in his 1877 judgment on the 16 062 acre Mangaporau block. He found that, "[t]his land seems never to have been occupied except occasionally for snaring birds eels &c.", and went on to grant the land to Ngāti Hau, who had given evidence of their fishing rights.[44] However, this is a lone example, as

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[42] Honorary Secretary of the Wanganui Acclimatization Society to Minister of Internal Affairs, 24/4/1914, Wanganui River — Fishing Rights of Maoris, Marine Dept file M 1/7/10, N.A.; Collector of Customs, Wanganui to Secretary of the Marine Department, 19/12/1917, ibid.; Wanganui Herald, 24/3/1928, ibid.

[43] Judgment, Pourewa, 18/8/1869, MB 1C p.292

[44] Judgment, Mangaporau, 1/8/1877, MB 1F p.272

in many cases where river bank land was being investigated, people did not even discuss fishing rights in the Court. This may well be an indication of the low priority that the Court gave to fishing rights.[45]

With the exception of the gigantic half-million acre Waimarino block, which ran along much of the left bank of the upper river, the late 1880s were a slow period for the passage of uninvestigated land through the Native Land Court. On the other hand, around this time successive Māori land statutes made it increasingly easy to bring partition cases, and partition and succession cases often contain discussion of fishing rights in greater detail than is found in initial investigations. The Court dealt mostly with these partition cases during the early 1890s, when the most drastic river work was being undertaken. Many partitions were the result of part of the land being sold to Pākehā.

The last few big river blocks were passed through the Court in the late 1890s. Much fishing evidence was given during these cases as people discussed their personal rights in greater detail than had been possible in earlier hearings, and the fisheries evidence formed an important part of the information that judges worked from. Yet in the judgments on these cases, fisheries were only mentioned occasionally or implicitly in judgments as a sign of occupation or 'act of ownership', and the ramifications of fishing rights were not discussed. This continued even when Judge Robert Ward took over as the regular Whanganui judge in 1888, and heard most of the late initial investigations in a sympathetic and relaxed manner. Despite the great discussion of fisheries on the Tawhitinui block, which took months to investigate, fisheries were not even mentioned in the final judgment.[46]

There was a lull in legal cases dealing with the river in the early part of the twentieth century, but issues such as the destruction of river weirs, removal of gravel from the river bed for public works, and the outlawing of traditional fishing equipment prompted a reassertion of Māori rights in the river. Piki Kōtuku and others unsuccessfully petitioned Parliament for £30 000 in compensation payments "in respect of Native rights on the Wanganui River" in 1928.[47] The

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[45] Examples of large riparian blocks where fisheries were not discussed include Ramahiku, 1881, MB 3 pp.323-334; Maraekowhai, 1886, MB 9 p.188 ff.; Ahuahu, 1886, MB 9 p.334 ff.; Kaiwhaiki, 1889, MB 14 p.434 ff.

[46] There were rare but brief mentions of fisheries by Judges Ward & Scannell, Pungaharuru, 31/8/1888, MB 13 p.423; Judge Ward, Waharangi Paekaka, 9/3/1900, MB 44 p.82. See page 121 *supra* on Ward's methods.

[47] 'Reports of the Native Affairs Committee' AJHR 1928 I-3, p.10

focus then shifted to the ownership of the bed of the river, and in 1938 Titi Tihu and others filed a claim in the Native Land Court, on behalf of the Whanganui tribe as a whole, to the bed of the river (as distinct from the land on its banks) from the tidal and 1848 sale limit at Raorikia to the junction with the Whakapapa River. The use of the river for fishing and catching birds was among the evidence of ownership given to the Court, and fishing rights were discussed at length by key witnesses. This was also the first occasion on which a claim was based on descent from the river *tūpuna* Hinengākau, Tamaupoko and Tūpoho. The Crown opposed this claim on the grounds that Māori custom did not allow ownership of the river bed, that Māori custom related only to use rights, and that the Crown's rights of sovereignty included the ownership of navigable waters.[48]

While most Māori in the Court discussed customary and traditional uses of the river (especially fishing rights), in order to show that they had customarily 'owned' the river and had not given up these 'ownership' rights voluntarily, the legal system tended to consider Māori claims strictly on points of Pākehā law. Judge Browne of the Native Land Court did find in 1939 that customarily each "tribe or hapu" owned everything within its boundaries including rivers, which would be regarded as valuable assets. His judgment was "that at the time of the making of the Treaty of Waitangi the bed of the Wanganui River ... was land held by the Natives under their customs and usages."[49]

After Judge Browne's finding that Whanganui Māori had owned the river as of 1840, the legal argument turned to what had happened to the river since that time. Mr. Morison, solicitor for the claimants, pointed out that all the available plans showed the river edge as the boundary of riparian blocks; but the normal legal position was that riparian blocks of land included the river bed up to the centre of the river (the *ad medium filum aquae* rule). By convention, when the land on the banks was originally investigated by the Native Land Court, ownership of the corresponding stretch of river bed passed to the party to whom the land was

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[48] Whanganui River Bed, 3/11/1938, MB 99 p.253 ff., MB 100 p.53 ff.; *In re the Bed of the Wanganui River* 1955 NZLR 419, at 445-446; E.J. Haughey 'Maori Claims to Lakes, River Beds and the Foreshore' NZULR 2 (1966): 29-42, p.33; Paul McHugh The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi Auckland: Oxford University Press, 1991, pp.124-125. Māori evidence from the river bed cases dealing with traditional fishing rights has been considered in the appropriate place in the following sections, alongside material from the nineteenth century Native Land Court cases: *e.g.* Hekenui Whakarake, Whanganui River Bed, 3/11/1938, MB 99 pp.256-259; Wharawhara Topine, ibid. pp.259-265; Eruera Te Aka, ibid. 27/4/1939, MB 100 pp.53-55; Andrew Anderson, ibid. 18/5/1939, pp.191-193

[49] Whanganui River Bed Judgment, 20/9/1939, MB 100 pp.226-228

awarded, and thence to the purchasers if the land was sold. This legal argument was followed by almost all the judges in following cases.[50]

The Crown appealed the 1939 Native Land Court decision, but the Native Appellate Court rejected the Crown case in 1944, on the grounds that the Native Land Court was competent to determine all questions of customary title. It also pointed out that where rivers passed through blocks, the Crown recognized Māori ownership of the beds. The case returned to the Native Land Court for a formal investigation of title in 1947, but the Crown challenged the validity of the preceding judgments and the case was moved to the Supreme Court in 1950. The Crown's argument was that the case could not proceed because the bed had already been investigated, under the *ad medium filum* rule, to which the Court conditionally agreed, while continuing to recognize Māori customary ownership.[51]

The government then appointed a Royal Commission of Enquiry under former Supreme Court judge Sir Harold Johnston. His brief was to determine whether the river bed would have been customarily owned but for the provisions of the Coal-mines Act Amendment Act, 1903, which transferred the beds of navigable rivers to the Crown. Once again, many Whanganui Māori gave substantial evidence of fishing rights and other customary uses of the river.[52] Johnston (whose knowledge of Māori custom was so limited that he confused *'pā tuna'* and *'tipuna'* when *take tipuna* was being discussed) recommended that some compensation be payable for the loss of Māori rights without their consent under the 1903 Act. Yet he found that their lost fisheries were worth little because, "I see no cause for compensation for a change over from an uneconomic way of life to an economic one or for a change of diet to a great extent voluntary."[53] The question of ownership of the bed was sent before the Court of Appeal in 1955, which found

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50 Mr. Morison, Whanganui River Bed, 4/11/1938, MB 99 pp.268-269; *In re the Bed of the Wanganui River* 1962 NZLR 600 at 600,609

51 Whanganui River Bed, 20/12/1944, Wanganui Appellate MB 11, p.111 ff.; Whanganui River Bed, 11/2/1947, MB 104 p.361 ff.; *The King* v. *Morison* 1950 NZLR 247; Haughey 'Maori Claims to Lakes...', pp.33-34; New Zealand Law Commission The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi Wellington: Law Commission, 1989, pp.74-76,167; McHugh The Māori Magna Carta, pp.124-125; Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) Wellington: The Tribunal, 1988, p.106

52 e.g. Hekenui Whakarake, Commission Proceedings, pp.Q.3-W.8; Titi Tihu, ibid. pp.Y.4-2A.3

53 Commission Proceedings, p.Y.5; Commission Report, p.15. Mr. Spratt, the solicitor representing the Whanganui people, also stated at one point that everyone present knew the meaning of the word mana, apart from the Crown Solicitor Mr. Currie: p.R.1.

that the river bed had been owned under Māori custom, and in 1962 the Court of Appeal decided that *ad medium filum* had applied to Native Land Court grants, and the 1903 Act had conveyed the bed to the Crown.[54]

This decision closed off a legal avenue not only for Whanganui Māori but for all other tribes that sought to regain control of their rivers. The ramifications of this case in the Whanganui were that even where riparian land remained under Māori ownership, the vesting of the bed in the Crown and the powers of the River Trust Board left them with little recourse when river works affected fisheries. The Whanganui fisheries were further affected by the Tongariro hydroelectricity scheme, which diverts water from the Whanganui headwaters into the Lake Taupō catchment, via Rotoaira. This scheme has had a drastic effect on the remaining traditional fisheries on the Whanganui River, as river levels have dropped and catches become much less reliable since diversion began in the early 1970s. Whanganui Māori have been heavily involved since then in hearings concerning minimum flow levels for the river resulting from the hydroelectricity scheme.[55] In 1994, Whanganui Māori turned to the Waitangi Tribunal with a broad-based claim for the recognition of their mana over the river, denied to them by the judicial decisions and government policy of the previous 150 years.[56] At the time of writing the Tribunal had not reported on the Whanganui River claim.

Derivation of rights in the Whanganui fishery

Traditional disputes over fisheries and fishing rights in the Whanganui River found a new forum for expression in the mid to late nineteenth century, in the form of the Native Land Court. Hapū and other groups fought to retain control of their customary lands and fisheries in the face of rival claims, and in doing so they gave a great deal of evidence concerning the use of the land and fisheries under investigation. Where claims to blocks were closely argued, as in many partition cases and some later investigations of title, the use of the fisheries and the underlying rights were often discussed in great detail by the different people and groups claiming to

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[54] Commission Report, *passim*; *In re the Bed of the Wanganui River* 1955 NZLR 419, 1962 NZLR 600; Haughey 'Maori Claims to Lakes...', pp.34-39

[55] Wai 167 #D-18 pp.2,11-12; Henare, p.38; Ranginui, pp.34-35. See page 289 *supra*.

[56] Wai 167 #D-18 pp.4-6,12-13

have an interest in that fishery. This same pattern was carried over into the legal investigations of the twentieth century, except that on those occasions Whanganui Māori argued their rights against the Crown rather than against neighbouring hapū and iwi. One of the key aspects of fishing rights discussed in the courts was the derivation of rights, and the circumstances which had led to a present-day right being claimed.

In the Whanganui River area, as elsewhere, by far the commonest *take* or source of fishing rights put forward to the Native Land Court was ancestry or *take tupuna*, which required the reinforcement of continued occupation or *ahi kā*. It was common for people appearing in the Court to describe the rights of particular ancestors as "*take*" or "*take* on this land". Karehana Tahau summed up the approach of Whanganui Māori in the Court when he told Judge Ward: "In my opinion[,] in claiming Native land ancestry is the first claim, then occupation. Paerangi is the common ancestor on this land and any person who can trace descent from that ancestor has a right on the block."[57] While this was the most common basis for claiming rights to land or fisheries, others were also put forward to the Court, such as seizure by force, gifts of land and resources, and rights obtained through intermarriage. As with *take tupuna*, these also needed to be accompanied by *ahi kā* for a claim which would be respected by both other Māori and the Court.

As already discussed, claims to the river as a whole were based on descent from the three ancestors Hinengākau, Tamaupoko and Tūpoho, children of Tamakehu and Ruaka. However, these ancestors were relatively recent, and claims of fishing rights in the courts were almost always based on descent from those ancestors put forward as ancestors on the land. These land and fishing rights ancestors were sometimes antecedent to the three river ancestors, from whom all rights to the river were said to flow.[58] There are at least three possible explanations for this apparent incompatibility. Firstly, the three river ancestors could have been regarded as symbolic and representative, as their mana was closely associated with that of the river, and they were important in terms of tribal identity with the river. People were often reluctant to discuss these deeply spiritually significant associations in an open place such as the

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[57] Karehana Tahau, Puketarata Subdivision, 27/3/1889, MB 15 p.113

[58] Titi Tihu, Commission Proceedings, p.Z.1; *In re the Bed of the Wanganui River* 1962 NZLR 600 at 614-615 per Cleary J. See pages 337-338 *supra*.

Native Land Court. Secondly, if the symbolic relationship of all Whanganui people with the river was expressed through these ancestors, it would not have been appropriate for different sections of the tribe to assert these rights against others who also shared them. Thirdly, the land-based approach of the Native Land Court may have been responsible for the association of fisheries with land rights. Some combination of these three and other factors may also have been at work.

People often claimed fishing rights (either on behalf of themselves alone, or a wider group) in a particular fishery on the basis of a very general ancestral right, which was sometimes extremely imprecise. Fisheries were also often subsumed under the claim to a block as a whole — an ancestor would be put forward as *pūtake* on the block, and fisheries would be discussed in this context by the members of that party without necessarily clarifying the connection between that ancestor and the fishery. Rather, the fisheries evidence would concentrate on contemporary or recent use of the fishery as proof of 'ownership' of the block.[59] These general claims of ancestral rights to fisheries were especially common in those cases where the land was to be sold to the Crown or settlers immediately after investigation, or where rights were being disputed at a more local level. In the Rānana case, where the title to the land was issued by the Court to the Governor on completion of the investigation, Hōri Kīngi Te Anaua said simply and without opposition, "it is my land, it was my ancestors: it is a 'mahinga kai'..."[60] On the Okahukura block, at the far headwaters of the Whanganui, Wineti Paranihi did claim to be descended from Rākeipoho, Pouroto and Rereao (all Ngāti Tūwharetoa ancestors), but his statement regarding his fishing rights on the block was restricted to: "All the streams on the Block have been fished in by my ancestors for eels."[61]

Rights to fisheries at a hapū level were usually based on descent from a particular named ancestor, commonly but not always the eponymous ancestor of the hapū. The intermediate ancestors would usually also be named and their use of the resource discussed. Because of the way these claims were structured, the hapū link was often mentioned only in the initial

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[59] The Native Land Court preferred to deal with fisheries as an act of ownership or a sign of occupation of the adjoining land, rather than to treat them as a separate type of property. See pages 112-113 *supra*.

[60] Hori Kingi Te Anaua, Ranana, 21/1/1867, MB 1 pp.119-122

[61] Wineti Paranihi, Okahukura Proper, 5/3/1886, Taupō MB 4 pp.297-299

stages of the discussion and was thereafter referred to only indirectly. Each person tended to talk about their own descent and intermediate links from the first named ancestor, leaving other members of their hapū to discuss their own whakapapa. While spelling out only their individual interests, people put these interests firmly within the framework of their hapū claim and the rights derived from their ancestors. There were numerous cases where fishing rights were claimed by descent from a named ancestor (usually in the region of six to eight generations back) who had used the fishery, as had all of their subsequent descendants in the given line of whakapapa.[62]

In his introduction of his claim to the Mangaporau block, Paora Poutini said he was of Ngāti Haunui-a-Paparangi, and that the land "belongs to Ngatihau only". His claim was supported by whakapapa going back seven generations from himself to Tutehaiao. He said that Tutehaiao and the other ancestors had all occupied the land and taken food from it, "and our fires have constantly burned on it and never been put out by any one." When he then went on to discuss *kāinga* and eel fishing-spots on the block used by himself, it was in the context of this ancestral and hapū association.[63] Neri Te Kapua also appeared for Ngāti Hau/Ngāti Haunui, but with a whakapapa going back seven generations to Tamakehu. Once again the use of resources, including fisheries, was traced back through this succession of ancestors: "From Tamakehu's time to my fathers our only work here was bird catching &c. In our day we catch pigs and eels. We don't live permanently there."[64]

Hōhepa Tawhitopo appeared in this same case as a counter-claimant, of Ngāti Pourua, and made a similarly-structured claim to the land and its fisheries. Hōhepa traced his ancestry back to Turi, via his great-great-grandson Pourua (the eponymous hapū ancestor), but based the rights to the land on descent from Pourua's sons Tahau (his ancestor) and Tutamaki, some eleven generations before Hōhepa. He too said, "This land has been lived on by our ancestors and we have used it as a hunting and fishing place right down to my time. We never cultivated on it." He did not totally refute Ngāti Haunui-a-Paparangi's claim, but said it was on a different part of the block, towards the river, while Ngāti Pourua's area was to the west, on the tributaries of the Whanganui and Waitōtara Rivers. Menehira Wahiawa, also of Ngāti Pourua but descended from

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[62] *e.g.* Toma Taiwhati, Puketotara, 3/8/1880, MB 3 p.46; Komene Papanui, Karewarewa, 4/8/1880, MB 3 p.50; Reone Te Maungaroa, Waharangi, 20/12/1899, MB 42 pp.326,330

[63] Paora Poutini, Mangaporau, 27/7/1877, MB 1F p.237

[64] Neri Te Kapua, Mangaporau, 31/7/1877, MB 1F pp.264-265

Tutamaki rather than Tahau, made a similar statement. He gave a ten generation whakapapa from Tutamaki, said, "My ancestors just named all worked on this land", and then went straight on to discuss his own use of fisheries on the block, the implication being that he had a right to these fisheries through descent from Tutamaki.[65]

Some ancestral hapū claims to fisheries were more direct. Ngāti Hinearo were the applicants for the Kaitangata block, which covered only 2700 acres but took about three months to hear in the Court. The Ngāti Hinearo case was based on descent from Hinearo and Rangiwhangongo, whose interest came from the intermarriage of his descendants with some of Hinearo's descendants. Taeawa Te Ope, one of those who appeared for Ngāti Hinearo, laid out the basis to some of their fishing rights:

> I live at Parihaka. I am one of the persons claiming this land Kaitangata thro Hinearo & Whangongo.... I can speak of the marks [of occupation] in the river.... Matawhero an eel weir, Hinearo worked there and so did my elders & I have done so too. There are places where we used to get Kokopou and pariri [a small fish] at places in the river opposite Kaitangata in canoes. These fishing places belong to N. Hinearo & we fish there still.... Our fires have been kept burning on this land ever since the time of Hinearo to the present.[66]

This statement lays out the basic components of a claim to rights through ancestry. Taeawa could put forward descent from the hapū ancestor, who had used the fishery, and stated that his intermediate ancestors had also fished there, thus demonstrating *ahi kā* or continued occupation by keeping the fires burning.

Some ancestors were the *pūtake* for substantial claims to land and fishing rights without also being known as hapū ancestors. One of the most notable of these was Nukuteaio, who was put forward as an ancestor on the Tawhitinui block. He was one of the few ancestors whose whakapapa was traced back in the Court to the three river ancestors, with Pene Te Rangihauku giving a whakapapa showing Nukuteaio as the great-grandson of Tamaupoko and great-great-grandson of Ruaka. Nukuteaio's descendants constituted a group resembling a hapū, and exercised fishing rights on a scale which was commonly restricted to the hapū, but they did not identify themselves as a hapū, let alone as Ngāti Nukuteaio. The unusual nature of this group's self-identification and its relationship to their fishing rights is an interesting exception to the general pattern.

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[65] Hohepa Tawhitopo, Mangaporau, 30/7/1877, MB 1F pp.248-253; Menehira Wahiawa, ibid. pp.254-255

[66] Taeawa Te Ope, Kaitangata, 17/5/1895, MB 25 pp.113-114; see also Hoani Tumango, ibid. 6/5/1895, pp.20-24

Pene Te Rangihauku said that he "had a claim on" the land through both Nukuteaio and Hinekōrako. These two were not closely related by blood, but Pene was descended from both through the marriage of Nukuteaio's child and Hinekōrako's grandchild. He listed a number of resources used by Nukuteaio and subsequently by some of his descendants, of more than one descent line. Many of these resources were fisheries, including several named *pā tuna* in the river at Te Punga and Haumoana. On the other hand, the resources given as coming from Hinekōrako were all land resources such as cultivations and bird-snaring trees. While Pene said some of Ngāti Hinekōrako also shared the use of the weirs, they were clearly traced from Nukuteaio:

> Another eel weir was 'Manurua' built in the first place by Nukuteaio. My elders used it and so did I. Another pa 'tuna' is Opawhero in the Wanganui river near where the other pas are at Haumoana rapid. [Marginal note: 'Purewa and Raikapaia worked here']. These are all the pa tuna's at this locality.
> A lamprey weir at Te Aua called by that name. Worked Hope & Purewa & others.[67]

Pene was not a direct descendant of most of the people who had used the weirs claimed by him, indicating that his claim referred to the whole Nukuteaio descent group rather than to his own particular line.

The claims of Pene and his group were not unopposed, and there was clearly contemporary political dissension at work as well as the older contentions which saw Pene distinguishing the rights of Nukuteaio from the rights of Hinekōrako. Many others in the Court said that Nukuteaio's descendants did in fact get their rights by their descent from Hinekōrako; and Ārama Tinirau, who appeared for another unrelated party in this case, said that Nukuteaio's descendants were known as Ngāti Ruamano after Nukuteaio's wife.[68] These debates no doubt reflect some division of local significance, but in terms of fishing rights, it is more interesting that fishing rights were claimed by a descent group resembling a hapū, over fisheries of a size that would normally come under the control of a hapū. Thus it would seem that hapū fishing rights were not narrowly restricted, and it may not be valid to distinguish between the fishing rights of self-identified hapū and groups such as Nukuteaio's descendants.

Rights to fisheries were also claimed by very small hapū, or sub-sections of established hapū. Although the claimants represented by Te Poari Kuramate in the Whataroa case only

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[67] Pene Te Rangihauku, Tawhitinui, 16/5/1900, MB 44 pp.316-319,328-329,345

[68] Werahiko Atarea, Tawhitinui, 7/6/1900, MB 45 pp.112-114; Menehira Te Kooro, ibid. 20/6/1900, pp.176-177; Arama Tinirau, ibid. 26/6/1900, MB 45 p.222; Poma Haunui, ibid. 4/7/1900, p.273; Take Take, ibid. 19/11/1900, MB 46 p.186

numbered four people, he described them as the hapū Ngāti Te Kai Karangi, a small hapū descended from Ngāti Ruaka. He told the Court: "We claim this land as the property of our ancestress Te Kai Karangi who owned it & it has been in possession of her descendants down to the present time — the food we get from this land are birds eels fern root &c."[69] Rimitiriu Kahukura of Ngāti Te Kai Karangi also claimed the nearby Matataranui block with five others of the hapū, saying that the land had belonged to their ancestor Te Kai Karangi, and that those claiming were "her descendants who now occupy". Among the settlements and resources listed by Rimitiriu was the Matatara Stream, a tributary of the Whanganui: "Matatara is a "mahinga tuna" [eel fishery] of ours — my ancestress' "pa tuna" was there. Te Re Turaunuhia is another — these pa's are not now there but the "tia's" [stakes] are & I get eels there with lines."[70] As Te Kai Karangi was Rimitiriu's great-great-grandmother, Ngāti Te Kai Karangi was not a particularly large or old hapū, but they did choose to identify themselves in the Court as such.

An example of a right claimed by a sub-section of a hapū is found on the Pourewa block on the Upokongaro River. While only 44 acres in size, it was claimed by twenty or thirty people belonging to Ngāti Tumango (although only eight were included in the title because of the provisions of the Native Land Act in force at the time). Almost the only evidence concerning the occupation or use of the land was that given by Ratana Te Urumingi:

> My hapu ki runga ki te whenua is Ngati tu mango. My iwi is Ngati tu wera — Pourewa Omoearo is a stream — Mate Kahu is a 'Kainga' of our 'tupuna'....
> We claim this land as the possession of an ancestor Te Amio his fire always burnt on this land & he caught rats & his 'pa tuna' was in Upokongaro the pa tuna was called Pourewa. My grandfather Te Kaho o te rangi 'mahi tuna' [worked eels] at that pa tuna — the acts of ownership.[71]

While Ratana Te Urumingi did not give his whakapapa in this case, Te Amio was six generations antecedent to him, and the other grantees were mostly distant cousins of the same generation. In turn, Te Amio belonged to Ngāti Tumango, a major hapū along the lower reaches of the river.[72]

Others mentioned fishing rights in connection with a relatively recent ancestor while tracing their general rights to the whole block back much further. On the Whakaihuwaka block,

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[69] Te Poari Kuramate, Whataroa, 17/8/1869, MB 1C pp.279-280

[70] Rimitiriu Kahukura, Matataranui, 1/6/1870, MB 1C pp.298-299

[71] Ratana Te Urumingi, Pourewa, 18/8/1869, MB 1C pp.290-291

[72] Ratana Te Urumingi, Matataranui, 6/6/1870, MB 1C p.301; Ratana Te Urumingi, Patupa, 29/1/1879, MB 2 pp.170,173; Heni Ratana [wife of Ratana Te Urumingi and descendant of Te Amio], ibid. 30/1/1879, p.177; Ratana Te Urumingi, Parikino Subdivision, 6/3/1889, MB 15 p.33

Wīremu Kiriwehi connected his fishing rights with his great-great-grandmother Pura. While he traced his whakapapa back thirteen generations via Pura, and said that both she and her husband Namotu had a right on the block, he did not go back before her in his discussion of his and his relatives' fishing interests:

> As to my ahi ka. I remember when quite a boy going to Waitotara from Pipiriki via this block. My elder relation Ngaputa a desc. of Pura pointed out the various places on this block to me instructing me.... She told me there was a Stm there called Pakeka where eels were caught. She said we had rights there.... In the year 1863 I & my elders & relatives descended from Pura went to get eels in this Pakeka Stm. My companions were Tuateri Makena Kahutuanui te Peita, & ors & my elders then present said we had rights in common at this place....
> There is a rapid on the Wanganui River at Otauira where our elders had an eel weir their cult. Being just above the rapid on this block, those cults were worked by those people who were descendants of Pura.[73]

This passage demonstrates not only Wīremu's connection with these fisheries through his more immediate ancestors, which was a reinforcement in the Court of the wider claim from the earlier ancestors, but it also demonstrates the process by which ancestral rights were handed down. Senior family members (not always parents) took their younger relatives onto the land and taught them about resources and their ancestral connections. While other people disagreed with Pura's descent from the ancestors named by Wīremu, they did not dispute the rights of her descendants to be included on the block.[74]

Not all ancestral rights were based on descent from an early ancestor. When discussing their fishing rights many people worked back from themselves, rather than forward from the relevant hapū ancestor, and discussed the rights of their parents and other immediate ancestors. Sometimes this was done clearly within the hapū claim, and the discussion often referred to specific fisheries rather than all the fisheries on the block in question, with an implicit connection with the earlier ancestors and other hapū members. However, at other times it was done with only a vague reference to earlier ancestors, and it is clear that people were associating their fishing rights with a much more recent ancestral connection. In these cases, people often discussed their use of fisheries (especially weirs) simply on the basis that they had been used by their elders or old people.[75]

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[73] Wiremu Kiriwehi, Whakaihuwaka Relative Interests, 12/2/1898, MB 36 pp.314-315

[74] Wiremu Kiriwehi, Whakaihuwaka Relative Interests, 12/2/1898, MB 36 pp.313-317; Te Keepa Tahukumutia, ibid. pp.318-320,325-326

[75] *e.g.* Utiku Moehea, Patupa, 29/1/1879, MB 2 p.174; Tamihana Makohu, Otamoa No. 2, 12/8/1880, MB 3 p.80; Hohepa Te Rire, Waharangi, 18/12/1899, MB 42 p.316

As can be seen from many of the examples already given, ancestral rights to fisheries and land in general could be derived from female as well as male ancestors. *Take tupuna* was not restricted to rights claimed in the male line only. The determining factor was not the gender of the ancestor, but the ability to demonstrate *ahi kā* as well as *take tupuna*. Whakapapa given by Ratana Te Urumingi in the Matataranui case, which gave the sex of each person, showed that rights were passed down from Te Amio without regard to gender. Wīremu Kiriwehi's description of his interests on the Whakaihuwaka block shows that women had a greater role to play in the transmission of fishing rights than merely providing an ancestral connection. Not only were his rights based on descent from a female ancestor, but he was also taught his rights by an older female relative.[76]

While ancestral rights could be derived from women, many claims of fishing rights were put to the Court on the basis that a man had exercised his wife's fishing right or come onto the land on the strength of her right. These sorts of fishing rights related primarily to eel and lamprey weirs. The construction and use of large weirs was a tapu operation in which women were not allowed to participate, and thus one might expect their rights to be utilized by their close male relatives.[77] Poma Haunui spoke about his hapū Ngāti Toki's fishing rights, and discussed the use of a number of *pā tuna*. Among these was Kaitara, about which Poma Haunui said, "Pairoroku husband of Ritowhare was the last to use Te Aua eel weir. It belonged to Ritowhare his wife." While it was most commonly men who used their spouses' rights, Te Keepa Tahukumutia told the Court that Kataraina had used a weir through the right of her husband Rini Hemoata.[78] In some cases there was already a relationship between husband and wife, such as belonging to the same hapū, and people were then able to share the rights of their spouses' more immediate kin groups as well as their common hapū rights. Menehira Te Kooro discussed the people who used the weirs at Te Punga:

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[76] Aperahama Tahunui, Pukohu, 7/1/1869, MB 1C p.190; Ratana Te Urumingi, Matataranui, 6/6/1870, MB 1C p.301; Poari Kuramate, Patupa, 31/1/1879, MB 2 p.183; Wineti Paranihi, Okahukura Proper, 5/3/1886, Taupo MB 4 p.299; Karehana Tahau, Kaiwhaiki Partition, 8/12/1896, MB 36 p.127. See also pages 357-359 *supra*.

[77] Piripi Aokapurangi, Karewarewa, 4/8/1880, MB 3 p.50; Ratana Te Urumingi, Ramahiku No. 1, 13/9/1894, MB 22 p.107; Hori Pakehika, Te Tuhi, 10/7/1895, MB 26 p.27; Pene Te Rangihauku, Tawhitinui, 16/5/1900, MB 44 p.318; Pita Te Rahui, ibid. 7/11/1900, MB 46 p.125; 'Access courses', p.39; Ranginui, pp.34-35. See pages 178-179 *supra*.

[78] Poma Haunui, Tawhitinui, 4/7/1900, MB 45 p.273; Te Keepa Tahukumutia, Whakaihuwaka Relative Interests, 6/5/1898, MB 37 p.277; see also Judgment (Judge Ward), Waharangi Paekaka, 9/3/1900, MB 44 p.82

> ...the land [and eel weirs at Te Punga] was used by Hipirini, an elder of Poma Haunui. Rangitakuku used it first & Hipirini married his d[r] & so Hipirini used it. He belonged to the same hapu as well.[79]

However, a husband's fishing and land rights were limited after the death of his wife, especially if they had no children by that marriage.[80]

The use of a *pā tuna* or *utu piharau* by a man through his wife's right was one of the many ways in which people put forward claims to fisheries on bases other than the combination of *take tupuna* and *ahi kā*. Related to the use of fisheries by spouses was the use of fisheries by other relatives who did not have an ancestral right to the resource in question, a type of right which was described in Wairarapa as *take whanaunga*.[81] People in the Land Court talked about examples of these sorts of rights dating both from earlier ancestral times and from their own experience.

Hoani Tumango's claim on the Kaitangata block was based on descent from two ancestors, Hinearo and Rangiwhangongo. Rangiwhangongo himself never lived on the land, but his descendants came onto it in two different ways:

> The Whangongo people got onto this block of Kaitangata thro intermarriage with Hinearo people.
> Some of the desc[endants] of Whangongo did not intermarry with Hine te aro people they came onto the land because Puna te ari [a child of Whangongo] married Kawiu, a desc of Hinearo. Whangongo had no right of his own on this land.... When the Whangongo people went on to the block on the marriage of Puna te ari with Kawiu the issue of these Kawiu people became identified on this block as the N. Hinearo.[82]

This implies that Puna te ari was accompanied to Kaitangata by other Rangiwhangongo relatives, whose descendants would have been able to claim rights through *ahi kā* if they remained on the land for a sufficient length of time. Many would also have intermarried in turn with others of Ngāti Hinearo, but the initial right of the Rangiwhangongo people to be on the land came from their relationship with Ngāti Hinearo through Puna te ari and Kawiu. These Rangiwhangongo descendants were included in the title by Judge Ward, alongside Ngāti Hinearo.[83]

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[79] Menehira Te Kooro, Tawhitinui, 8/6/1900, MB 45 p.153

[80] Topia Turoa, Pungaharuru, 28/8/1888, MB 32 pp.392-393; Hori Pakehika, Te Tuhi, 10/7/1895, MB 26 p.23; Wikirini Te Tua, Tawhitinui, 4/12/1900, MB 46 p.305

[81] See page 207 note 91 *supra*.

[82] Hoani Tumango, Kaitangata, 6/5/1895, MB 25 p.24

[83] Judgment (Judge Ward), Kaitangata, 7/6/1895, MB 25 p.226

It was not always a whole group of relatives who came to share with their in-laws. It was much more common for people to give examples of a single person sharing in the resource of a close relative by marriage. Ratana Te Urumingi mentioned a lamprey weir in the river at Otumairi, and said that it had been used by Ngawaka and Tuka. Evidence he gave elsewhere showed that these two were brothers-in-law, Tuka being married to Ngawaka's sister.[84] Similarly, Rini Hemoata said that Matini worked at the Te Puha eel weirs "through his sister Turangaiti who was married to Tuaia a desc of Hinewhakawhiu." Hinewhakawhiu was one of the descendants of Tararoa, from whom the land was claimed.[85]

The use of fisheries by a spouse or relative by marriage could be subject to formal arrangements, rather than just tacit approval from the others who had an interest in the fishery in question. When a man came to live with his wife and her family on their marriage, he was often formally gifted land and resources by his wife's family, for the couple's support. Missionary Richard Taylor reported that it was common for men to live with their wives' families in Whanganui,[86] which was not the case in many other parts of the country. Fisheries were not often mentioned directly in relation to these gifts, but gifts were often made of areas of land known to contain fisheries.

A gift made of some land around Pukehika pā suggested that there was a distinction between gifts of land and gifts of resources (such as fisheries). The local hapū had assembled at Pukehika for protection from raiding *taua*, but there was trouble there between Ngāti Ruaka and Ngāti Hau, who were both descended from Tamakehu. To end the trouble, the Ngāti Hau chief Tahukumutia gifted an area, bordered by both the Whanganui River and Mangoihe Stream, to Ngāti Ruaka. Raihania Takapa of Ngāti Ruaka said: "He did not give it to them as a cult[ivation] only, but a deliberate gift to the N. Ruaka, & as to the Pukehika land we still retain it th° it is not yet put th^m^ the Court."[87] Judge Ward disagreed with Raihania's interpretation, saying that Tahukumutia only allowed Ngāti Ruaka to grow food there while they were taking refuge in Pukehika. This implies that there was usually a clear distinction between gifts which

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[84] Ratana Te Urumingi, Te Tuhi No. 3, 8/8/1895, MB 26 pp.133,139

[85] Rini Hemoata, Whakaihuwaka Relative Interests, 10/5/1898, MB 37 p.293; see also Rangiwakateka, Tawhiti-nui, 17/7/1900, MB 45 p.345; Raihania Takapa, ibid. 10/12/1900, MB 46 p.125

[86] Richard Taylor 'Journals', vol. 5, 2/10/1848

[87] Raihania Takapa, Morikau, 18/1/1899, MB 39 pp.301-302,305; Judgment, ibid. 10/2/1899, MB 40 p.60

allowed only the temporary use of the resources of the land or waters, and gifts which conveyed full rights to use and occupy land and fisheries.

New fishing rights could also be created by appropriating them by force from a previous owner. While the Native Land Court records indicate that fighting was common in the Whanganui river area, attempts to seize fisheries were rare. In fact, it seems that crop planting and the catching of seasonal fish runs had priority over at least intra-iwi fighting.[88] It was however reasonably common for people to state that their rights to land in general were based at least in part on the forcible acquisition of the area by their ancestors.[89] One such right was claimed by Pauire Te Rangikatatu and his sister at Mangapapapa, based on the 'conquest' of the area by their grandfather Kaponga. Pauire said that Kaponga had "owned" some eel weirs, which had later been used by Pauire and his uncles. However, the claim of Pauire and his sister was rejected by other parties and Judges O'Brien and Puckey.[90]

The best example from the Land Court minutes of a fishery being fought over was the Te Pua *pā tuna* at the mouth of the Mangataunoka Stream, near Pipiriki. Potatau Kauhi claimed to have a right to the land to the south of this stream through *ahi kā* and descent from Uenuku Poroaki. In addition to this, he said that he and his parents had worked at the Te Pua eel weirs without interference, and that his grandfather Rehe Rehe had killed a man there. According to Potatau, this man Te Ikatohu of Ngāti Hau had come to take the weirs (which had been made or renewed by Rehe Rehe) from the descendants of Uenuku and Tararoa. Potatau's family had later left the area and moved upriver, but an aunt and uncle "of sorts" had continued to use the weir. Potatau summarized his claim to rights in the weirs by saying, "We claim to have ahi ka & Raupatu [conquest] because my Ancestor kill the man before named."[91]

Potatau's interpretation of events was challenged by others with an interest in the fishery. Te Keepa Tahukumutia, who was responsible for determining the relative shares of

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[88] Hohepa Tawhitopo, Mangaporau, 30/7/1877, MB 1F p.251; Bates Pictorial History, p.200; Downes Old Whanganui, p.82; Murray, p.202. See page 383 *infra*.

[89] *e.g.* Tamahana Makohu, Karewarewa, 3/8/1880, MB 3 p.49; Pauire Te Rangikatatu, Waimarino, 15/3/1886, MB 9 p.286; Tuanini, Whitianga, 21/8/1894, MB 22 p.26; Topia Turoa, ibid. p.2

[90] Pauire Te Rangikatatu, Waimarino, 15/3/1886, MB 9 pp.283-286; Rangihuatau, ibid. 16/3/1886, p.289; Judgment, ibid. p.290

[91] Potatau Kauhi, Whakaihuwaka Relative Interests, 6/5/1898, MB 37 pp.275-276,281-284

Uenuku Poroaki's descendants for the Court, agreed that the weir was a very old one, and had been used by the Uenuku and Tararoa people. He also agreed that Rehe Rehe had killed Ikatohu there, but gave a more detailed account. Te Keepa said that Ikatohu and companions did go to the *pā tuna* with the intention of taking them, and were seen there by a woman and child. The woman went to Pipiriki to fetch her male relatives to protect the weirs. As Rehe Rehe happened to be visiting Pipiriki at the time he came with them. In the fight between the two parties Rehe Rehe killed Ikatohu and put his head on a post of the *pā tuna*. Te Keepa said that Rehe Rehe had never worked at any weirs in that area, and that after the fight he had returned to Manganuiateao.

Te Keepa also denied that Potatau was a direct descendant of Rehe Rehe, and described him rather as "a distant younger relation" (actually a great-nephew). He said that there had been a later dispute over the use of the Ngāwaierua *pā tuna*, one of the six weirs in the Te Pua fishery — Karaitiana Te Mutu had objected to Potatau's father Te Kauhi using the weir, and:

> There was an investigation among us about it and the decision was given against Te Kauhi & party.
> Te Kauhi claimed it as a desc. of Matini, who obtained his right thr° Raupatu of Rehe Rehe & o[the]rs.

He said that Potatau "may have" used the weir at some time, but if he had done so it was only while he was visiting the people who ordinarily used the *pā*. Potatau's claim to the fishery was rejected by both the other claimants and Judge Ward because Rehe Rehe had only killed Ikatohu as part of the party which came from Pipiriki, and as he did not stay in the area he had no *ahi kā*. Rehe Rehe's descent from Uenuku and his role in protecting the fishery did not confer any rights on his descendants without the necessary corollary of *ahi kā*.[92]

Rights to fisheries were sometimes claimed on the basis that the claimants or one of their ancestors had developed the fishery in some way. Many of the cases relating to fisheries contained discussion of the ancestors who built or renewed eel or lamprey weirs, and placed great emphasis on the building of weirs as a sign of 'ownership'. There were other forms of development in addition to weir-building. Raihania Takapa's claim to part of the Morikau block was mostly based on *take tupuna*, but he also discussed the activities of his elders and relatives on that land. Among the areas he discussed was a small lake: "A lake ... called Rotoroa at that place

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[92] Te Keepa Tahukumutia, Whakaihuwaka Relative Interests, 6/5/1898, MB 37 pp.275-276,281-284; Ihaka Rerekura, ibid. 9/5/1898, pp.286-287; Reone Maungaroa, ibid. 10/5/1898, pp.289-290,293; Rini Hemoata, ibid. pp.293-294; Judgment, ibid. p.295

there is a flax cult. planted by us.... Shortly after Moutoa [1864] one of my Aunts put some salmon in that lake." Hami Te Riaki, another relative of Raihania's, also spoke about this lake: "I have heard that some English fish were put by Ateria in Rotoroa lake because there was no lake at Ranana.... these fish were salmon, the putting of the fish in the lake had nothing to do with the land."[93] Unfortunately, Hami did not elaborate on this last statement. It may have been because he saw the lake and its fisheries as something separate from the land under debate; or it may have been felt that such a late development on the block was not relevant to Land Court proceedings, as the Court was directed to determine customary owners as of 1840.[94]

The examples given throughout this section show that whatever the *take*, or source of title, no successful claim to land or a fishery could be made without proof of *ahi kā* or continuing occupation. In many cases, people were able to prove that they were descended from an ancestor who had rights over the land or fisheries, but were not granted land by the Court because they and their immediate ancestors had not kept up the rights on the land. The Land Court formulated this principle into what is called the 'three generation rule', under which no person could claim land or rights if their family had been absent for three or more generations. Conversely, people who could prove more than three generations connection with the land without any other firm *take* were often deemed to have established a right to the land by the Court.[95]

This rule did have its roots in Māori custom, although evidence from Māori in the Land Court suggests that its operation was more flexible in practice. Parties that had established a firm case from *take tupuna* and *ahi kā* often rejected the claims of distant relatives because they had abandoned the land in the past. Hare Te Apa o Te Rangi was granted a small share of the Otamoa N° 2 block, but this was disputed by Āperahama Tahunuiarangi, who said that while Hare had an ancestral claim, his family had been expelled three or four generations back for insulting Āperahama's ancestors, and "[s]ince that time they have never regained possession, nor even attempted to do so. They have no fishing station nor Eel weirs nor any other evidence of ownership & occupation."[96] Where people had been absent from the land for any length of time,

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93 Raihania Takapa, Morikau, 18/1/1899, MB 39 pp.300-301; Hami Te Riaki, ibid. 23/1/1899, p.351

94 See pages 116-117 *supra*.

95 *e.g.* Judge Heale, Patupa, 4/2/1879, MB 2 p.202; Judge Ward, Te Tuhi, 20/7/1895, MB 26 p.48; Judge Ward, Morikau, 10/2/1899, MB 40 pp.58-59; Judge Ward, Waharangi, 24/1/1900, MB 43 p.123

96 Aperahama Tahunuiarangi, Otamoa No. 2, 21/7/1881, MB 3 pp.130-131, see also p.94.

they could come back onto it with the agreement of or at the invitation of the people still on the land. As Atarea Taiwhati told, people could come back onto the land by other means:

> Taongarakau was killed at Ranana his children dispersed therefrom & did not return until Korakotau came back to the district on his marriage with Hinekorako then he lived for the first time on this block thro his wife Hinekorako.

Other people traced their descent back to Taongarakau via Kōrakotao and his wife Hinekōrako.[97]

On the other hand, claims of rights to land made in the Court on the basis of having occupied an area and used its resources were usually rejected if there was no underlying *take* such as *take tupuna* (ancestry), *take tuku* (gift), or *take raupatu* (conquest). If people had been simply allowed to use a resource, as with the case of Potatau and his claim to the Te Pua eel weirs,[98] neither judges nor other Māori in the Court regarded this as giving the sorts of rights which would justify permanent inclusion in a Crown-derived title. Occupation without any corresponding *take* was often called *he mahi noa iho*, meaning 'an unauthorized act' or 'squatting'.[99]

The chief Hōri Kerei Paipai succinctly summed up the principles of ancestral fishing rights when he appeared as a claimant in the Pungaharuru case. He told Judges Ward and Scannell: "There were 3 reasons for my coming before the court. My ancestors, my father, and the work I have done on the land in the shape of fishing."[100] In this statement he expressed his *take tupuna*, or his rights from his ancestors, and his mention of his father's use of the land both reinforced *take tupuna* and demonstrated *ahi kā*, or the continuing use of the land and fisheries since the time of those ancestors. Finally, the mention of his own use of the fisheries reinforced Paipai's *ahi kā* and his personal familiarity with the land and its resources.

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[97] Atarea Taiwhati, Tawhitinui, 1/6/1900, MB 45 p.63; Raihania Takapa, ibid. 7/5/1900, MB 44 pp.229-230; Rangiwakateka, ibid. 20/7/1900, MB 45 p.375; Mata Kaihoe, ibid. 10/12/1900, MB 46 pp.325,327

[98] See pages 363-364 *supra*.

[99] Judgment (Judge Ward), Morikau, 10/2/1899, MB 40 p.60; Eruini Rangiirikau, Tawhitinui, 21/11/1900, MB 46 p.217; Hakaraia Korako, Patupa, 6/9/1870, MB 1C p.351; Heni Ratana, ibid. 30/1/1879, MB 2 p.177; Judgment (Judge Ward), Kaitangata, 7/6/1895, MB 25 p.220. See pages 390-391 *infra*. Very rarely temporary occupants were allowed into the Crown grant through "aroha" or goodwill: Judgment (Judge Ward), Kaitangata, 7/6/1895, MB 25 p.224; Karehana Tahau, Kaiwhaiki Partition, 8/12/1896, MB 36 p.129. See pages 118-119 *supra*.

[100] Hori Kerei Paipai, Pungaharuru, 28/8/1888, MB 13 p.398

Hapū, whānau, and personal fishing rights

As seen in the preceding section, rights to fisheries as well as lands were most commonly claimed by descent from a named ancestor or ancestors. In the Whanganui area, this ancestor was not always an eponymous hapū ancestor, nor did the group claiming the fishery from an early ancestor always identify itself in the Court as a hapū. This contrasts with areas such as Taupō and Wairarapa where these broad ancestral rights were usually traced from the hapū ancestor, and were made in the hapū name. Nevertheless, in Whanganui fishing rights were often claimed by a group describing itself as 'the people of ...' or the descendants of ...', which corresponds to the hapū, and this distinction between forms of self-identification may not have any important implications for fishing rights.[101]

The Land Court process encouraged such general claims with its investigation of large areas of land and charging of costs,[102] but within the general hapū case people often claimed a personal fishing right (used either by them alone or by their immediate family and dependants in their right), or rights shared with close family members, to the exclusion of others in the wider descent group. These claims to personal or whānau rights were much more common in cases where only a small area was being investigated, or in cases where relative interests or partitions were being considered.

In the Land Court cases dealing with the river bed, and the 1950 Whanganui River Commission, many people (especially Pākehā) stated that fishing rights in the river were divided into discrete hapū parcels, spread along the riverbanks. The evidence of Joseph William Tarry, who had worked along the river for over thirty years, is representative. He told Judge Browne in the initial Whanganui River Bed hearing that, "Each tribe living on the River bank had fishing rights over a fixed length of the river"; and said there was a fishing right in every stretch of river, belonging to the hapū living on the banks.[103] Judge Adams summed up the approach of the

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[101] The tribal prefixes Ngāti, Ngāi, and Te Āti all mean 'the descendants of', so if the Native Land Court interpreter or clerk chose to translate these terms, they would then appear in the minute books as 'the descendants of ...' when the witness had actually said in Māori, 'Ngāti ...'. See pages 356-357 *supra*.

[102] See pages 114-115 *supra*.

[103] Joseph William Tarry, Whanganui River Bed, 18/5/1939, MB 100 pp.79,197-198; see also Commission Report, p.7

general courts when he said, "It seems clear on the evidence that the fishing rights were rights of the riparian hapus, and not tribal [iwi] rights."[104]

Māori evidence in the river bed cases and Commission investigation concurred conditionally with this view, and Hekenui Whakarake agreed that hapū fishing rights were spread along the riverbanks. However, he did not restrict the 'ownership' of fishing rights to single hapū. Under cross-examination from his counsel, Mr. Spratt, he described who had rights over *pā tuna*:

> Who would have the right to deal with that pa tuna and to use it? ..... The Maori. Which Maori? ..... The tribe. The sub-tribe. Some of the sub-tribes who are capable go down and build that pa. The owner.[105]

This suggests that fishing rights over *pā tuna* could be held by anything from a 'tribe' [perhaps one of the major Whanganui hapū or a collection of closely-related smaller hapū][106] to a subsection of a hapū. People in earlier Native Land Court cases also gave a much more detailed picture of hapū claims to fishing rights than that typically expressed by Pākehā witnesses and judges.

In some cases fisheries were amongst the various types of property claimed by one or more hapū in the Court alongside land, other resources such as rat runs and birding trees, burial grounds, and cultivations. In the Tokamaru case, Reneti Tapa stated his claim to a part of the block: "I belong to Ngatirangipo Tribe and live at Parikino.... I claim on behalf of my hapu to have an interest in this land.... We cultivated and exercised other rights of ownership in catching rats eels &c."[107] While only listed as a 'right of ownership', fisheries were clearly included in the range of hapū property in this case. At Puketōtara, the land as a whole, with all its composite resources, was claimed jointly by a number of hapū — Ngāti Toki, Ngāti Puku, Ngāti Hinekōrako, and others. "[C]reeks where we caught eels" were specifically included in the list of property belonging to these hapū.[108]

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[104] *In re the Bed of the Wanganui River* 1955 NZLR 419 at 453; see also at 427 per Hutchison J; *In re the Bed of the Wanganui River* 1962 NZLR 600 at 606,609-610 per Gresson P

[105] Commission Proceedings, pp.U.1-U.3,W.6

[106] See page 18, and page 339 and note 22 *supra*.

[107] Reneti Tapa, Tokamaru, 4/3/1876, MB 1F p.21; see also Reneti Tapa, Pukenui, 6/2/1879, MB 2 pp.218-219,230

[108] Toma Taiwhati, Puketotara, 3/8/1880, MB 3 p.46

In the Tawhitinui case, which lasted several months and heard a great deal of evidence relating to fisheries, many people stated that fisheries on the river were 'owned' by their hapū. The claimant Raihania Takapa, in his initial statement of his case, claimed the block by descent and permanent occupation from Taongarakau. He went on to add: "I have tohu's [signs] of [Ngāti] Taongarakau on the land — for instance the Kainga on the land & bird catching places, lamprey weirs, some in streams & some on bank of Wanganui, [bird snaring trees, etc. etc.]".[109] Once again, fisheries were included as one of the general resources on the land. Other people representing other hapū on the Tawhitinui block were more specific, giving the names of rapids and weirs over which their hapū held fishing rights. The weirs in the Tatamoana, Te Aua, and Parapara rapids were said to belong to Ngāti Toki, while others at and near Te Punga, Kauaeroa, and Haumoana rapids were said to belong to both Ngāti Toki and Ngāti Hinepuke. Representatives of Ngāti Te Puha o Te Rangi and Ngāti Hinekōrako claimed fisheries at Rangiwakamataku, Tatamoana, Haumoana, and Papamoana rapids, but were not agreed on whether these fisheries were shared or held separately.[110] Within all these claims of hapū fishing rights at Tawhitinui, people also said that particular weirs in a rapid were worked by certain people, implying that this was done within an overall hapū right. While all the resources were listed under a hapū umbrella, their actual use was restricted to a sub-section of that hapū.

In addition to discussing fisheries as hapū property, people often talked about fisheries used by or belonging to the descendants of a particular ancestor. Many of these claims to fishing rights based on descent from an ancestor (rather than claims based on belonging to the hapū that 'owned' the fishery) have been dealt with in the earlier section on the ancestral derivation of fishing rights, and one example will suffice here. On the large Morikau block, the Court divided shares in the land among various early ancestors, and these interests were then divided further amongst subsequent ancestors. The interests of one such ancestor, Tumoehau, were shared by the descendants of Taiaoao, Ruaroa, and Hinekiore. The three hapū springing from these three ancestors had overlapping but not identical interests in fisheries on the Tumoehau part of the block. Ria Poma, of all three hapū, said: "The part opposite Kauaeroa is Te Makao lamprey weir near there is used by Taiaoao people & also by those of Hinekiore. Another at Te Aomahau

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[109] Raihania Takapa, Tawhitinui, 7/5/1900, MB 44 p.231

[110] Menehira Te Kooro, Tawhitinui, 8/6/1900, MB 45 pp.152-153,176; Poma Haunui, ibid. 4/7/1900, pp.273,281,306,328; Rangiwakateka, ibid. 17/7/1900, pp.345,375; Pita Te Rahui, ibid. 2/8/1900, MB 46 pp.71,92-94,126; Take Take, ibid. 19/11/1900, p.186; Eruini Rangiirikau, ibid. 21/11/1900, p.207

wai te miti used by people of Taiaoao & Ruaroa." Representatives of the three hapū said that Taiaoao's descendants should get the most shares in the land, because "Taiaoao has the biggest int[erest] out of these three."[111]

Sometimes 'ownership' of fishing resources would be attributed to a group of people who, though not clearly identified as such in the Court, were all descended from a single ancestor, usually the ancestor from whom that party was claiming its right to the land. In the Te Tuhi case, Haimona Te Ao o te Rangi said that Te Korire *kāinga* was occupied by several people, all of whom were shown elsewhere to be descendants of Rangiwahakore, one of the ancestors put forward for the whole block. As well as living at the *kāinga*:

> ...these people got eels & Kokopu in Wanganui.
> An eel weir there was called Te Awa o Wanganui. It was constructed by said people. Tauranga Kotari another eel pa in the Wanganui River — made and used by the same people.[112]

It is evidence from elsewhere in Haimona's case that shows that the common factor between these people was descent from Rangiwahakore as well as residence at Te Korire, and so they are perhaps better identified as a community group rather than a hapū group.

In the Kahakaha subdivision case, Rahera Tiweta distinguished between the 'ownership' of land and use of a fishery claimed by descent from a particular ancestor. He said, "The Te Mairi lamprey weir was used by all the desc. of Tutehomutu my father used it & Hoani Tumango & others", but added that, "I have a much better right to this land than Hoani Tumango party have. We have better occupation rights I have never seen the others occupy."[113] While not willing to admit all Tutehomutu's descendants to a right in the land, Rahera was prepared to acknowledge that all had used the fishery, suggesting that usage rights derived from that ancestor had been kept up even when residence rights on the land had not.

Many fishing rights discussed by people in the Land Court were much more analogous to a whānau or family right than a larger-scale hapū right. As outlined above, people often made a distinction between the 'ownership' of the fishery (which was usually attributed to the hapū) and the right to use the fishery, which was often restricted to a particular sub-section of the hapū.

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[111] Arama Tinirau, Morikau, 17/4/1899, MB 40 pp.183-184; Ria Poma, ibid. pp.184-185

[112] Haimona Te Ao o te Rangi, Te Tuhi, 26/6/1895, MB 25 pp.325,330,353. See page 375 *infra*.

[113] Rahera Tiweta, Kahakaha Subdivision, 28/9/1894, MB 22 p.160

For example, Weraroa Kīngi gave the names of numerous *kāinga*, cultivations, and fisheries on the Kaitangata block, and said, "All the places I have mentioned belong to N. Hine." However, when he went on to describe these areas further, he gave the names of only a few of the elders and people of the hapū for each resource, suggesting that the overall resource rights of the hapū were allocated to groups of hapū members, often whānau. Hoani Tumango too distinguished between resources used by one or two individuals, 'families', and 'all of Ngāti Hinearo' on this block.[114]

As in other regions, the distinction between hapū and whānau rights often depends on the definition of hapū and whānau rather than the nature of the right.[115] For example, while Ngāti Te Kai Karangi appeared in the Court as a hapū group on a few blocks around the lower Upokongaro River, in the Whataroa case they numbered only four people (Te Poari Kuramate, Epiha Patapu, Paora Patapu, and Parokoru Patapu), although other kaumātua who had recently passed away had also lived on the land. Their *pūtake* on the land, Te Kai Karangi, was about four generations removed (Epiha Patapu called her his 'kuia'), but the four claimants appear to have been more closely related. The identical surnames and claims of three of them suggests that they were brothers, cousins, uncles or nephews.[116]

The use of *pā tuna* on the Matataranui block was discussed by Ratana Te Urumingi, in the context of his claim, his wife's, and those of other relatives to be included through their descent from Te Amio.[117] He said, "Otaumana was a 'pa tuna' of Totara's and of Taaki's and Ngaawakari also of Totara and Taaki and Te Rangiaoma there was a mahinga of Taaki's and of Heni's matua [parent(s)].... Otawa was a pa tuna used to mahi [work] in [up] to the days of Heni's matua." The whakapapa given by Ratana Te Urumingi shows that these people comprised a fairly small whānau group — Taaki was Heni Ratana's paternal grandfather, Te Rangiaoma was his brother, and Tōtara was their father. Heni's father Pirato was Taaki's son, but both her mother Pupu and her husband Ratana Te Urumingi were also descendants of Te

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[114] Weraroa Kingi, Kaitangata, 24/4/1895, MB 24 pp.310,314,316-317; Hoani Tumango, ibid. 7/5/1895, MB 25 pp.32-40

[115] *e.g.* see pages 303-304 *supra*.

[116] Te Poari Kuramate, Whataroa, 17/8/1869, MB 1C pp.279-280,285; Epiha Patapu, ibid. p.287. These four were granted the block as sole owners, p.289. See also pages 357-358 *supra*; Parokoro Patapu, Waipakura Partition, 11/9/1894, MB 22 pp.99-102.

[117] See pages 358,360 *supra*.

Amio and his grand-daughter Ruamōkai. While the fishery itself was attributed to Tōtara, his children, and grandchildren Ratana Te Urumingi implied that he and other spouses also used it.[118]

Ārama Tinirau distinguished between weirs worked by a whānau and those worked by a larger group on the Tawhitinui block. He claimed the land on behalf of those descended from the siblings Hamama and Karara, and said that some weirs around the Wakapuataku rapid were used by all the descendants of these two, or a representative group of them — "all the people used them as they desired". However, he said the weirs Wahanui, Taura Kawau, and Tahuna in this area were used "by Tinirau No. 2 & brothers & cousins", implying that a more limited whānau right was involved.[119]

Hoani Tumango's discussion of Ngāti Hinearo's resource rights on the Kaitangata block also clearly shows that fishing rights could be exercised on a range of levels. He distinguished between rights used by one or two individuals, 'families', and the whole hapū. He also gave an example which demonstrated that members of the same whānau could have both common and different rights:

> Kariangaanga belonged to Uruhau family. It was a kainga.
> Tau Tauwai. Uruhau's family caught eels here & Tika's family.
> Mawhitiwhiti. Te Roa and family worked there, they got hinau birds & eels....
> Ruataniwha same people [descendants of Uruhau, Tika, and Te Roa] got eels there.[120]

The three people mentioned were brothers, were great-grandsons of the hapū ancestor Hinearo, and great-grandfathers of the current users. While the three brothers had some shared resources, such as Ruataniwha, they also had separate resources of their own for the use of their own dependants only.

This last example also demonstrates the nature of what could be called personal rights to fisheries. The fishing rights of the three brothers were personal, in that they were associated with them by name, and were separate from the rights of their siblings. However, they were not strictly individual rights because they were also used by the dependants of each man. As with whānau rights, people often placed 'ownership' of fisheries with the hapū as a whole, but gave

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[118] Ratana Te Urumingi, Matataranui, 6/6/1870, MB 1C pp.301-302; see also Ratana Te Urumingi, Patupa, 29/1/1879, MB 2 pp.170-171

[119] Arama Tinirau, Tawhitinui, 22/6/1900, MB 45 pp.198-199

[120] Hoani Tumango, Kaitangata, 7/5/1895, MB 25 pp.39-40. See pages 370-371 *supra*.

the names of individuals who worked them, implying a more restricted personal usage right was respected. Many larger fishing interests were also said to have belonged to a single ancestor, but these ancestral claims usually played down the interests of others. Therefore it is difficult to determine from the evidence given under these circumstances whether a personal right did actually exist, especially if a substantial fishery was said to have belonged to one person alone.[121]

Some people also said that they or their contemporaries personally 'owned' or had the use of a fishery, most often a named eel or lamprey weir. For example, after describing the weirs he and his family had used at Tawhitinui, Metera Te Urumatu said, "Taura Raira same place Waimarino at same rapid belonged to Arama Tinirau the elder, Taura Raira belongs [now] to Waka Pene, Waimarino belonged to Kerei these were all people of my party." Other weirs on that block (mostly *utu piharau*) were said to have had individual owners, with Whatarangi Teka saying, "Te Aua lamprey weir it is mine".[122] As late as 1939 people were saying that they personally 'owned' weirs on the river. Andrew Anderson of Ngāti Kura said that he owned an *utu piharau* at Paparoa, which had been given to him by his uncle. He mentioned other weirs surviving on the river which belonged to individuals or families. When the Crown solicitor Mr Prendeville asked Anderson, "Were private rights recognized as regards the weirs, was individual ownership recognized?", he answered yes.[123]

Hōri Pakehika said in 1895 that another lamprey weir had an individual owner:

> There is a lamprey weir in the Wanganui River it is called Towhenua it belongs to Anaru Patapu — there is also a place for catching whitebait, Nopera used it.
> There is another lamprey weir just below the mouth of the Otukopiri St[m]... This weir was made by desc[endants] of Rangiwahakore.[124]

In this statement Hōri distinguished between a fishery owned by an individual, used by an individual, and used by a larger kin group. Te Keepa Tahukumutia also made similar distinctions for the six weirs in the Te Pua rapid. While he said that four of these weirs were worked by groups of people, including 'families', he said of Tokanui weir, "Rini Hemoata worked here", and

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[121] Cases where ancestors were said to have owned small resources, like *pā tuna*, may be more clear-cut: *e.g.* Rimitiriu Kahukura, Matataranui, 1/6/1870, MB 1C pp.298-299; Ratana Te Urumingi, ibid. 6/6/1870, pp.301-302; Pene Te Rangihauku, Tawhitinui, 16/5/1900, MB 44 pp.316-318,345

[122] Metera Te Urumatu, Tawhitinui, 7/5/1900, MB 44 p.241; Arama Tinirau, ibid. 25/6/1900, MB 45 p.208; Pita Te Rahui, ibid. 2/8/1900, MB 46 pp.92-94; Whatarangi Teka, ibid. 29/11/1900, p.267; See also Wi Pauro, Morikau, 20/1/1899, MB 39 p.325; Ria Poma, ibid. 17/4/1899, MB 40 p.185.

[123] Andrew Anderson, Whanganui River Bed, 18/5/1939, MB 100 pp.74-76,191-192

[124] Hori Pakehika, Te Tuhi, 10/7/1895, MB 26 p.27

that Otauae was worked by Tamakehu. Te Keepa then said that he was "the head of or Ariki of all these people & had rights at all these weirs. These people are Kurawhatira people." However, when listing the weirs and the people associated with each, he only gave his name in association with two weirs.[125]

The ways in which Māori made their claims to the Court often make it difficult to determine whether a personal right was being implied, or whether people intended to include their wider kin group within the scope of their own claim. People were usually unwilling to talk in detail about anything but their own rights, except when rebutting the cases of others. People also brought their *tūpuna* and history with them to the Court, and included the rights of these ancestors with their own. They interleaved discussion of their own use of fisheries with statements of hapū and ancestral use of fisheries and other resources. Thus what appears at a cursory reading to be a statement of claim to a personal fishing right is often rather an expression of a right to share in the resources of the hapū or wider community. What had originally been a wider right could also appear as a personal right if all the other members of the entitled hapū, whānau or community had moved away or died.[126]

There is also evidence to indicate that some people worked fisheries on behalf of their hapū or community because of their skill at making and using *pā tuna* and *utu piharau.* Hoani Tumango told the Kaitangata hearing:

> We got eels in the Wanganui River Te Mai (just beyond Puketutu) was an old eel pa. It was used by all the desc[endants] of N. Hinearo. There is a lamprey weir close to the shore at that place this belongs to the same people. Hemi & I worked there in latter days. He worked there because he was an expert at that work.[127]

Speaking much later, Hekenui Whakarake emphasized that skilled fishers worked on behalf of the whole community, and that major catches were distributed amongst the whole group:

> In the season of bird snaring, they [the bird snarers among the hapū] go up there and get those birds ... and bring them down and of course they shared out with the rest of the tribe.
> [Mr. Spratt:] And some would attend to the fisheries? ..... Yes.

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[125] Te Keepa Tahukumutia, Whakaihuwaka Relative Interests, 9/5/1898, MB 37 pp.281-282. See page 392 *infra.*

[126] Hori Kerei Paipai, Pungaharuru, 29/8/1888, MB 13 p.401

[127] Hoani Tumango, Kaitangata, 8/5/1895, MB 25 p.142. See also Karehana Tahau, Kaiwhaiki 1 & 2, 12/1/1898, MB 36 p.232

> [Mr. Spratt:] ...but the fishing people would share out their catches in the same way? ..... In the same way.... The people in the river, when they catch the fish and eel, they share out the same way.[128]

In this case Hekenui was referring to a group of fishermen, but he also said that there might be a "boss of [a] pa tuna", who organized its construction and maintenance (with help, if necessary), and shared out the catch from that weir. He described these 'bosses' as "A person doing that job, for the hapu."[129]

Not all fishing rights were 'owned' or used solely on the basis of a kin relationship with earlier owners. Where fisheries were 'owned' or used by a group of people, this group did not always identify itself as or correspond to the hapū. In many cases people in the Land Court gave the names of a great number of people who used a particular fishery, but these names do not necessarily correspond to the names given in the whakapapa of each hapū in the case. Where extensive whakapapa were not recorded in the minutes, it can be difficult to determine what the primary linkage was between the people named. Many fisheries were clearly associated with the residents of a given *kāinga* and so were worked by communities, defined primarily by common residence rather than common descent (although the members of these communities were commonly also closely related). An example of a fishery used by a community was the Te Awa o Whanganui and Tauranga Kotari *pā tuna*, which were used by the residents of the Te Korire *kāinga*, who were all also descendants of Rangiwahakore.[130] A very few fisheries seem also to have been seen as common or general fisheries, open to all, or at least open to all members of the various hapū living in the area.

For example, Hakaraia Kōrako told the Court of very broadly-defined fisheries on the Pukenui block: "The right of fishing in the streams was everyone's. I never heard that any ancestor claimed the exclusive right of fishing. The descendants of Hinepango and Tumango [two early ancestors of extensive hapū] used to fish together in this stream." Ārama Tinirau said likewise of two *pā tuna* on Tawhitinui: "these were made up by Reihana & all the people [the inference is 'all the descendants of Hamama and Karara'] used them as they desired." The implication of both these statements is that there was a broad fishing right open to all the hapū

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[128] Commission Proceedings, p.S.3. See also Mr. Spratt, ibid. p.Q.1; and Albert Edward Davey, ibid. p.2D.1, who said that "it was generally left to two or three men [of the *kāinga*] to set these weirs."

[129] ibid. p.U.3

[130] See page 370 *supra*.

appearing as claimants on the block, not all Whanganui Māori.[131] In the later cases in the Land Court, some evidence also suggests that there was an increasing casual use of some fisheries. Poma Haunui said, "We saw Te Reimana & Te Kauau working at Tatamoana, they used it because no one else was doing so."[132] This could well be a result of the decline in the Māori population of the upper river stretches as people moved out of the area, coupled with the destruction of *pā tuna* to make way for river boats. If few people were left to work the remaining high-yielding fisheries, it could be expected that there would be less objection to fishing without a clearly defined right at abandoned or under-utilized fisheries. Andy Anderson confirmed as much in 1939 when he told the Court: "At the present time it [the river] is open because there are not many natives on the river. When there were a lot of natives on the river as in the early days they could not [fish where they liked]."[133]

People often based claims to fishing rights on descent from particular ancestors, but then talked about using the fisheries with their "companions" rather than with relatives. Where people gave their whakapapa, these companions might be found to all belong to the same wider hapū group, but some other factor seems to have been at work in determining who shared what fisheries. It is most likely that people used the fisheries closest to their *kāinga* on a day-to-day basis, and so it may be that the hapū members resident in a given place used the fisheries associated both with that place and their hapū. However, people implied rather than spelt out this presumed relationship when describing their fishing rights to the Court. Mere Ngareta gave the names of a number of people with whom she worked on the land. Some of these were, like her, descended from Marukohana; and some belonged also to the hapū Ngā Poutama, which was one of Mere's hapū but not one of the claimant hapū on this block. She said that these same companions used one part of the block (which she herself did not use): "...they used to live on the banks of the Upokongaro St[nn] they caught eels in the stream & grew crops on the adjoining land. Te Rimu is another part our party worked."[134] This linkage of the eel fishery with residence on the river bank implies that residence as well as kinship was a factor in the use of the fishery.

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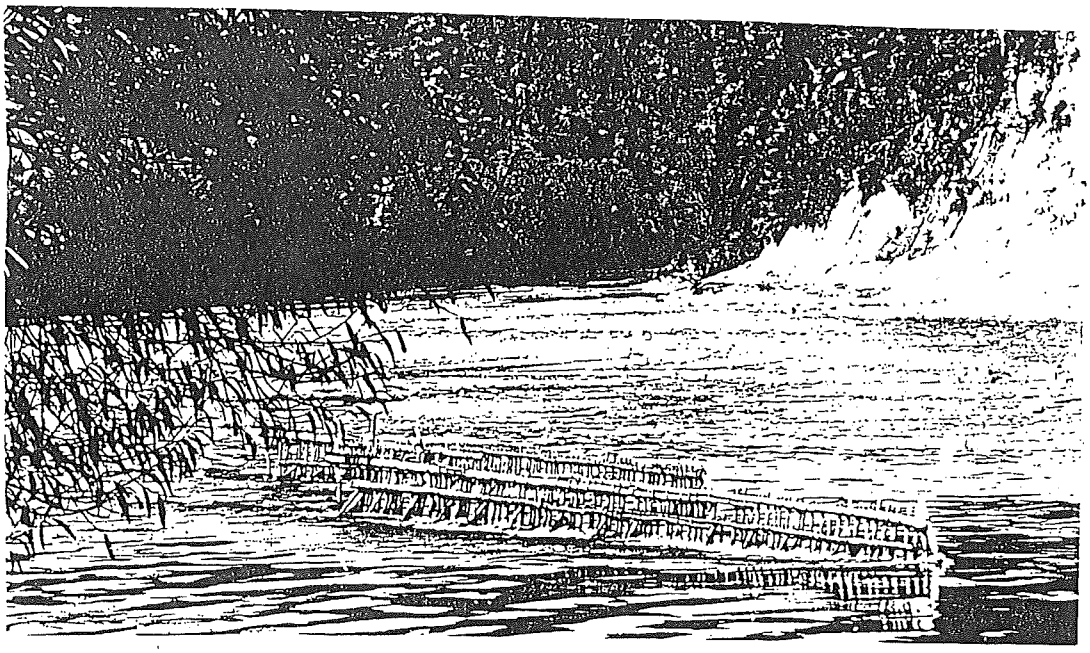
[131] Hakaraia Korako, Pukenui, 7/2/1879, MB 2 p.221 (Judge Heale awarded the block to most of the counter-claimants as well as the claimants — ibid. p.230); Arama Tinirau, Tawhitinui, 22/6/1900, MB 45 p.199

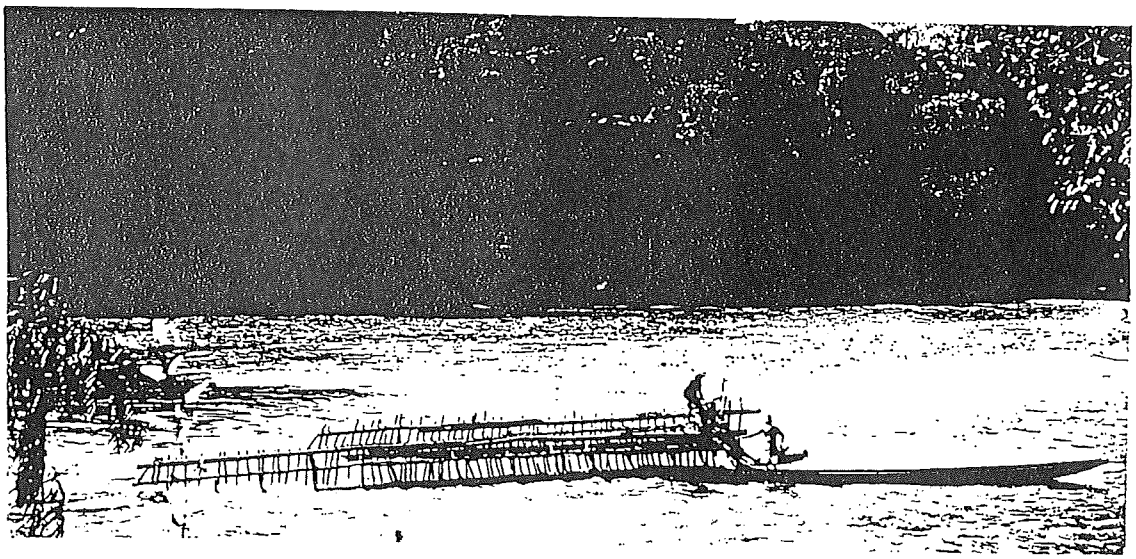
[132] Poma Haunui, Tawhitinui, 16/7/1900, MB 45 p.328. See also Whatarangi Teka, ibid. 3/12/1900, MB 46 p.283

[133] Andrew Anderson, Whanganui River Bed, 18/5/1939, MB 100 p.192

[134] Mere Ngareta, Kaitangata, 9/4/1895, MB 24 pp.228-230. See also Hare Te Apa, Kahakaha Subdivision, 3/10/1894, MB 22 p.194.

Fig. 8 *Pā auroa* **(eel weirs), Whanganui River, 1924**
Unlike conventional *pā tuna*, *pā auroa* are built almost parallel to the swift current of the Whanganui River
Photographs: J. McDonald, courtesy of National Museum of New Zealand Te Papa Tongarewa, Wellington, New Zealand, ref. B 780, B 783





The methods and assumptions of the Land Court in the nineteenth century did not allow for the consideration of the river as a whole, as evidence was generally restricted to the stretch of river abutting the land under consideration and fishing claims were based on hapū rights. However, in the twentieth century investigation of the river bed was based on the claims of the Whanganui iwi to the unitary title to the river by descent from the three river ancestors Hinengākau, Tamaupoko, and Tūpoho.[135] While people often expressed the view that the river as a whole, and its fisheries, was the property of all of the Whanganui iwi, they did not say that all of the fisheries were open to all of the people.

The ways in which Māori expressed their iwi rights to the river in the twentieth century, as compared with how they expressed their hapū rights in the nineteenth century, seem to be a good reflection of the different types of river rights discussed by the Waitangi Tribunal in the Mohaka River Report. Ngāti Pāhauwera claimant researcher Graham Butterworth distinguished between the "limited use rights" of the people who actually used the fisheries, the "proprietorial rights" of the river hapū, and the "rangatira rights" of the principal *rangatira* of the iwi, who oversaw the control and protection of the resources of the whole iwi. The Tribunal found that portions of the Mohaka River were not 'owned' by hapū, whānau or individuals without reference to the iwi.[136] It would seem that Whanganui Māori saw the Whanganui River in a similar light — the iwi as a whole had an interest in the river as a tribal *taonga*, and had suffered as a whole from its decline, hence it was appropriate to claim the entire river bed as an iwi or group of associated iwi. As Judge Carr said when the Whanganui River Bed case went to the Native Appellate Court, "The right to fish came through or under the general right of ownership of everything within the tribal boundaries — the tribe had no limited right, the right was an absolute one, and an all inclusive one."[137]

Those people who came to the Native Land Court and the general courts to argue the river bed case expressed the fishing rights of the Whanganui people on the river, without implying that general iwi 'ownership' of the river led to any person of the iwi having usage rights on any part of the river. Whanganui 'ownership' of the river was often discussed in the context of being

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[135] See pages 338-338,349-350 *supra*.

[136] Waitangi Tribunal Mohaka River Report 1992 (Wai 119) Wellington: Brooker & Friend, 1992, pp.16,47. See pages 9-10 *supra*.

[137] Judgment, Whanganui River Bed, 20/12/1944, Whanganui Appellate MB 11 pp.114-115

able to exclude neighbouring peoples such as Ngāti Tūwharetoa and Ngāti Ruanui from moving beyond their part of the river for fishing or travel,[138] and in that sense iwi 'ownership' of the river and its fisheries refers to the rights of the people of the iwi against people from other iwi, not amongst themselves.

Relationships between land, waters, and fishing rights

The arguments raised in the Whanganui River Bed cases in the Native Land Court and Supreme Court were greatly involved with the relationship between the 'ownership' of the river and the river bed and the 'ownership' of the riparian land. The general courts were especially concerned with whether Māori ownership of the river bank would implicitly extend to ownership of the adjoining river bed (and by extension its fisheries), as is the case in English law. Much of the debate in these cases was the result of the complexity of these matters in the Whanganui River area. Whilst there was a general correspondence between river rights and adjoining land rights, this correspondence was neither automatic nor complete. Many people had fishing rights at certain spots of the river without having rights on the banks, and vice versa. People also travelled great distances from all over the Whanganui region to use particular valuable and seasonal fisheries, such as the summer kahawai fishery at the river mouth.

Many fisheries, especially *pā tuna* and *utu piharau* located in rapids, were clearly associated with locations on the banks of the river, usually *kāinga*. In discussing the fisheries around the modern city of Wanganui, local historians Smart and Bates said that, "To the Maoris occupying Te Oneheke, this stream [Karamu] was a valued eel reserve, and Land Court records recount that the people of this village had a pa tuna or eel weir near the mouth of the stream."[139] *Pā tuna* and *kāinga* might even share a name, as in the case of the area claimed by Pauire Te Rangikatatu on behalf of Ngāti Kaponga: "I have a claim on the West side of the river in the Auau block. Haimatuke is a pa on this block, it is also the name of the land there, also of the eel pa."[140] At

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[138] Wharawhara Topine, Whanganui River Bed, 3/11/1938, MB 99 p.264; Eruera Te Aka, ibid. 27/4/1939, MB 100 p.54; Commission Report, pp.5,7-8,10-11; Hekenui Whakarake, Commission Proceedings, p.T.3

[139] Smart and Bates, p.32

[140] Pauire Te Rangikatatu, Waimarino, 15/3/1886, MB 9 p.286. See also Poma Haunui, Tawhitinui, 5/7/1900, MB 45 p.292

Tawhitinui, Werahiko Atarea of Ngāti Te Puha o Te Rangi said that the *kāinga*, cultivation and *pā tuna* Te Punga belonged to his hapū: "I have heard Te Punga was a Kainga of N. te Puha o te Rangi. I don't know who lived there, I have heard it was a Kainga used by people when working the eel weirs."[141] The connection between the occupation of the *kāinga* and the use of the *pā tuna* at certain times made this connection much stronger than many others stated to the Court.

In the outline of the full resources of the hapū or individual given in the initial statement of case, people often implied that particular fisheries and residences were related by listing them together, rather than consciously stating the relationship. In the Kaitangata case, Mere Ngareta of Ngāti Hinekakara claimed an interest along with many companions and relatives. She said, "...they used to live on the banks of the Upokongaro Str[m] they caught eels in the stream & grew crops on the adjoining land." This made an implicit link between these various rights, without spelling out the connection.[142] As in this example, fishing resources were often associated with other resource areas as well as *kāinga*. When Hoani Tumango laid out his claim to a part of the Kahakaha block, he mentioned the various pā of his ancestors, and the names of six *kāinga* along with their associated cultivations and kākā (native parrot) catching places. He then said, "My elders also had flax plantations at Hapu Wa[..?..] at Te Awamate they grew food. There was an eel lake at the same place I have caught eels there in my eel basket." Later he added, "We got eels & Hinau berries while living at Awamate & Kahakaha & Upokonui. We got eels at these three streams."[143]

Kāinga associated with particular fisheries were not always immediately adjacent to them, as the site would be determined by the full range of resources open to its residents — proximity to bird- and rat-catching areas would also be considered, as would safe access to the river. Karehana Tahau told the Kaiwhaiki hearing: "We young people used to get this food & take to the Kainga's.... I was the leader in the hunting persons and the food we got was... Hinau, eels, rats, birds & what other food was obtainable on the land."[144] This suggests that food

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[141] Werahiko Atarea, Tawhitinui, 5/6/1900, MB 45 p.100; Pene Te Rangihauku, ibid. 16/5/1900, MB 44 pp.316-317; Menehira Te Kooro, ibid. 8/6/1900, MB 45 pp.152-153; Raihania Takapa, ibid. 10/12/1900, MB 46 p.343

[142] Mere Ngareta, Kaitangata, 9/4/1895, MB 24 p.230. See also Paora Poutini, Mangaporau, 27/7/1877, MB 1F p.237; Hare Te Apa o Te Rangi, Otamoa No. 2, 17/8/1880, MB 3 p.93

[143] Hoani Tumango, Kahakaha Subdivision, 26/9/1894, MB 22 pp.142,146-150,157. See also Karehana Tahau, Kaiwhaiki Nos 1 &2, 12/1/1898, MB 36 pp.226-228; Wi Pauro, Morikau, 20/1/1899, MB 39 p.326

[144] Karehana Tahau, Kaiwhaiki Nos 1 &2, 12/1/1898, MB 36 pp.232

was caught in suitable places over the whole of the area under the control of the hapū (in this case, Ngāti Hinekehu and Ngāti Rata) and then taken back to the various *kāinga* in the area. Further up the river, Wī Pauro Tutaiwha said that he and his elders had lived at Jerusalem (Hiruhārama) while working *pā tuna* in the few kilometres down the river. In the twentieth century, Hekenui Whakarake said that people would come down from the *kāinga* to build *pā tuna* from a distance of maybe a mile or so away.[145]

Yet in the twentieth century river cases, when the courts were considering the river as a whole, it was a point at issue whether hapū fishing rights were strictly limited to the river frontage of each hapū. Eighty-eight year old Eruera Te Aka told the Land Court in 1939, "The fishing rights belonged to the people who owned the land alongside. The River was divided into different sections & people had fishing rights within the sections." In his judgment, Judge Browne concurred, and said that the Court had never heard that "the exclusive right to construct eel weirs or fish traps" did not belong to the hapū which 'owned' the river bank. Later, during the Commission of Enquiry, Hekenui Whakarake was asked by his counsel Mr. Spratt whether a hapū or sub-hapū "could keep out people from putting a pa tuna" in the river adjoining their land, and replied that this was so. He added that he did not know of any weirs that were not "right in front of" the land of the hapū that owned them.[146]

However, alongside such evidence that fishing rights went hand-in-hand with hapū 'ownership' of the river frontage, some instances of divided rights continued to be raised. Hekenui Whakarake himself said, "The leader of all the tribes had to separate the right of the land and the right of the river." When asked by Mr. Spratt, "Who would [the eels] belong to — the people who built the pa [tuna] or the people living on the bank?", Whakarake replied, "The people who built it — the man who built the pa."[147] Even in the Court of Appeal in 1955, Judge Hutchison found that, "speaking broadly, the fishing rights were the rights of the frontagers, ...

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[145] Wi Pauro Tutaiwha, Kauaeroa, 25/1/1901, MB 47 p.98; Poma Haunui, ibid. 29/1/1901, pp.105,114; Hekenui Whakarake, Commission Proceedings, p.T.5. See also Albert Edward Davey, ibid. p.2D.1

[146] Eruera Te Aka, Whanganui River Bed, 27/4/1939, MB 100 p.54; Judgment, Whanganui River Bed, 20/9/1939, MB 100 p.227; Commission Proceedings, pp.U.2-U.3,W.6

[147] Commission Proceedings, pp.R.1,U.1

[but] in particular cases persons not frontagers may have owned them or had an interest in them." Other judges also found that the correspondence was not necessarily a rigid one.[148]

There were a few examples from the nineteenth century Land Court records which stated or implied that some people had used fisheries without a right to the adjoining land. At Kahakaha, Rahera Tiweta said that all the descendants of Tutehomutu, including himself and his father, had used the Te Mairi *utu piharau*, as had Hoani Tumango. However, he opposed the inclusion of Hoani Tumango on the title to the land, because he and his father had lived on the block (and in his case, been born there), while Hoani and his people did not actually live there.[149] They did however live nearby, and this may be a case of surveyors' boundaries imposed by the Native Land Court system artificially cutting across traditional resource usage.

Another similar example was given in the Tawhitinui case, when Pene Te Rangihauku of Ngāti Hinekōrako and Nukuteaio claimed the land around the Te Punga *pā tuna* by descent from Nukuteaio. He suggested that while he had a joint right to the land and the weirs, others had a right in the fishery alone:

> Rahana lived at Te Punga while making an eel weir that was my land not his, I mean that at the proper season he used to go there & get eels from the weir I owned the land. He went from Tawhitinui.
> The people who used these weirs after I left were Rimitiriu & Te Harawira & Poma used to work Rahana's weir.

A claim to both the *kāinga* and *pā tuna* of Te Punga was also put forward by Menehira Te Kooro on behalf of Ngāti Hinepuke and Ngāti Toki, and Rahana and the others named were descendants of Toki. The judge ultimately rejected Pene Te Rangihauku's claim through Nukuteaio in favour of Ngāti Toki, and so Pene's claim that Rahana and others had a fishing right but not a land right may have been made because it was impossible to deny their fishing rights. Werahiko Atarea of Ngāti Te Puha o Te Rangi, another hapū with interests in the area, said that the *kāinga* Te Punga was occupied by Ngāti Te Puha o Te Rangi and Ngāti Hinepuke while using the weirs. But he added to this, "The people who used the weirs were not necessarily the people who owned the land."[150]

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[148] *In re the Bed of the Wanganui River* 1955 NZLR 419 at 427 per Hutchison J; at 440 per Adams J; at 468 per North J; *In re the Bed of the Wanganui River* 1962 NZLR 600 at 607 per Gresson P; at 619 per Cleary J.

[149] Rahera Tiweta, Kahakaha Subdivision, 28/9/1894, MB 22 p.160

[150] Pene Te Rangihauku, Tawhitinui, 16/5/1900, MB 44 pp.316-318,328; Menehira Te Kooro, ibid. 8/6/1900, MB 45 pp.152-153; Judgment (Judge Ward), ibid. 19/2/1901, MB 47 p.199; Werahiko Atarea, ibid. 5/6/1900, MB 45 p.100,113. See also Poma Haunui, ibid. 4/7/1900, p.268; Rangiwakateka, ibid. 17/7/1900, p.345; pages 360-361,369,379-380 *supra*.

The best-known example of a fishery used at a distance from the usual lands and residences of a hapū was the seasonal kahawai fishery at the river mouth. People travelled to use this fishery from as far away as the Tūhua district on the Ongarue River, beyond Taumarunui.[151] People came from all along the river's length to the river mouth, and each hapū had its own temporary settlement and fishing area there. Jerningham Wakefield said that he saw up to fifty canoes operating at once on the best fishing days. Local Pākehā historians recorded that traditional rivalries were put aside during this time and any warfare between hapū was suspended for the summer.[152] However, Raihania Takapa told of one instance when this was not observed:

> In the summer the N. Ruaka went down the river to the mouth to fish, after that the N. Hau went to took the Kumaras of the N. Ruaka at Ranana & they killed a man Rangiharire, the N. Ruaka heard of this at Putiki & a song was made by Tutara-kura.
> The N. Ruaka came back to Ranana at Whangairau a pa... it was attacked & a person of N. Hau named Takahapa [was killed], that death was deemed to satisfy the revenge of the N. Ruaka people.

Rangiharire had been left in charge of the growing crops whilst the rest of his hapū were at the coast; both he and the kūmara were eaten by Ngāti Hau.[153]

People also made shorter seasonal trips to exploit fisheries. T.W. Downes wrote that some upriver people travelled considerable distances, from as far away as Pipiriki and Taumarunui, to catch tunariki or glass eels as they climbed up the rock faces of waterfalls at the junction of the Ōhura and Whanganui Rivers.[154] Wineti Paranihi also told the Court how his mother used to travel from her home at Motuopuhi (an island pā in Rotoaira) to Papakai, at the very head of the Whanganui River, "and stop there one or two weeks for the purpose of catching eels."[155] These two places were only about ten kilometres apart, but as there were no eels in Rotoaira many of the Ngāti Tūwharetoa people of that area travelled to the headwaters of the Whanganui to catch them.

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[151] Hoani Mete Kingi, Pungaharuru, 29/8/1888, MB 13 p.407

[152] Keepa Tahukumutia, Waharangi, 14/12/1899, MB 42 p.299; Poma Haunui, Kauaeroa, 29/1/1901, MB 47 pp.115-116; Eruera Te Aka, Whanganui River Bed, 27/4/1939, MB 100 p.54; Andrew Anderson, ibid. 18/5/1939, p.76; Bates, p.200; Downes Old Whanganui pp.180-181; New Zealand Historic Places Trust Historic Places Inventory: Wanganui District Wellington: New Zealand Historic Places Trust, 1991, part 4; Smart & Bates, pp.27,36; Smart 'Maoris in the Wanganui Valley', p.1; Smart 'Notes (Putiki)'; Wakefield, p.178

[153] Raihania Takapa, Morikau, 18/1/1899, MB 39 p.304; see also Arama Tinirau, Tawhitinui, 25/6/1900, MB 45 p.214

[154] Downes History and Guide, p.19; Downes 'Notes on Eels', p.303

[155] Wineti Paranihi, Okahukura Proper, 5/3/1886, Taupō MB 4 p.299

The Whanganui River and its tributaries formed the boundaries between many of the hapū living in the area. Many Land Court blocks were bounded by streams and watersheds, which may have been as much for the convenience of surveyors as a reflection of traditional boundaries, but in many cases people specified that tributary waterways did form ancestral boundaries. Rimitiriu Kahukura and others told the Court that in ancestral times the related hapū Ngāti Iringangārangi and Ngāti Te Kai Karangi had lived on opposite banks of the Upokongaro River. However, while many people discussed fishing on the block, none specifically mentioned fisheries in the Upokongaro or the effects of its role as a boundary on these fisheries.[156] Others mentioned waterways containing fisheries which did serve as boundaries, but again did not discuss the wider implications. Ratana Te Urumingi claimed a part of the Parikino block called Te Hoki, saying, "there used to be an eel swamp formerly on the boundary but it is now dried up." He implied but did not clearly state that his ancestors had used this particular fishery.[157]

While most fishing rights on the Whanganui River itself were associated with the river bank hapū, there were often different hapū living on the opposite banks of the river.[158] The Whanganui River is relatively narrow for most of its length and the most valuable fisheries were found in rapids, which tend to run along one side of the river bed. This meant that there had to be some accommodation between the people on the opposite sides of the river to avoid conflict over fishing resources. The use of the Native Land Court minutes complicates the examination of this issue, because with only one exception blocks were bounded along one side by the river, and so each reach of the river was considered in two separate cases, often with different claimant and counter-claimant groups. The Land Court approach reflects English concepts of river rights as

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[156] Rimitiriu Kahukura, Whataroa, 18/8/1869, MB 1C p.282; Epiha Te Aokokiri, ibid. pp.283-284. See also Hakopa, Ohautahi, 1/2/1879, MB 2 p.196; Karahi Panikena, Waimarino Subdivision, 1/4/1887, MB 13 p.140; Ripeka Tauri, Pungaharuru, 14/8/1888, MB 13 pp.355-356; Heta Taura, Parikino Subdivision, 12/3/1899, MB 15 p.51; Hare Te Apa, Kahakaha Subdivision, 29/9/1894, MB 22 p.185; Hoani Tumango, Kaitangata, 8/5/1895, MB 25 pp.51-52,69; Haimona Te Ao o te Rangi, Te Tuhi, 25/6/1895, MB 25 pp.325-326; Raihania Takapa, Morikau, 18/1/1899, MB 39 p.300

[157] Ratana Te Urumingi, Parikino Subdivision, 6/3/1889, MB 15 p.33; see also Reneti Tapa, ibid. 13/3/1889, p.57

[158] On a few occasions people specified that an earlier ancestor had rights on both sides of the river, but did not discuss the mechanics of these fishing rights: *e.g.* Matiaha Totara, Patupa, 30/1/1879, MB 2 p.178; Mete Kingi, Ohautahi, 1/2/1879, MB 2 p.196; Pauire Te Rangikatatu, Waimarino, 15/3/1886, MB 9 p.284; Areta Te Wheoro, ibid. 16/3/1886, p.287; Hori Kerei Paipai, Pungaharuru, 28/8/1888, MB 13 p.397: Atiria Materoa, Waharangi Paekaka, 21/2/1900, MB 43 p.266. In the twentieth century, Wharawhara Topine said that 'different sections of the same hapū' lived across the river from each other. Whanganui River Bed, 4/11/1938, MB 99 p.265

an adjunct of rights to the adjoining land. The conflict between Māori concepts and the English law of *ad medium filum* was recognized in the twentieth century court cases, when the division of rights between the hapū living on opposite banks was a widely discussed issue. The Crown argued that *ad medium filum* applied to the Whanganui River after riparian blocks had passed through the Native Land Court, as by default English law vests ownership of the river bed in the riparian owners up to the exact halfway line in the river bed.[159]

In some places people do appear to have used *pā tuna* and *utu piharau* across the whole width of the river. In his discussion of the eel weirs of Ngāti Toki on the Tawhitinui block, Poma Haunui said:

> Tatamoana opposite Tawhitinui, Toki built it & his desc[endants] renewed it. Te Kawau & Rei[..?..] renewed it but they did not use it they did not catch any eels there & abandoned it.... Another lamprey weir at Te Aua just below Te Punga. Another eel weir Tarihineke in the same rapid (Te Aua). Not used in our time. We had another on the other side of the river named Kaitara.

Poma Haunui also later described an *utu piharau* belonging to Ngāti Toki at Kaitara as being "across the Wanganui River." It is not clear whether these weirs were shared in any way with the people on the other side of the river.[160] In the course of the Royal Commission enquiry in 1950, Hekenui Whakarake said, under examination by his counsel Mr. Spratt, that when there were different "tribes" or "families" on opposite sides of the river, as was usually the case, "They share half the river by arrangement between the lot of them." When questioned further about the use of four hypothetical weirs constructed in one rapid, he said, "If this sub tribe there and this one here share this pa, two for this side and two for that side."[161] A clear example of this was given in the Tawhitinui case, when Metera Te Urumatu discussed the Ngāhuinga *utu piharau*:

> That weir (Ngahuinga) is not on the other side of the Whanganui River, now I say Ngahuinga is on both sides of the river. I suppose I mean there are two weirs the one on the side of the land I claim it is called Ngahuinga & the one on the Ranana side is called Towhenua, the Ranana people used the Ngahuinga also.

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[159] *In re the Bed of the Wanganui River* 1955 NZLR 419 at 427 per Hutchison J, at 468 per North J. See pages 350-352 *supra*. Only one Native Land Court block, Ohotu, extended across both sides of the river, but ironically there was virtually no fisheries evidence given in this case. 18/1/1897, MB 32 pp.202 ff.

[160] Poma Haunui, Tawhitinui, 4/7/1900, MB 45 pp.273,328. See also Rangiwakateka, ibid. 25/7/1900, MB 46 pp.20-21

[161] Commission Proceedings, pp.U.2,U.4

The Towhenua *utu piharau* had already been discussed in the Te Tuhi case, which dealt with land on the other side of the river. Elsewhere in the Tawhitinui case, Pita Te Rāhui said that he and his elders had only used the weirs on their side of the river.[162]

These examples, dating from both the nineteenth and mid-twentieth centuries, all indicate that Māori concepts of dividing the river were not analogous to the riparian rights which the Native Land Court and general courts had in mind. The Pākehā view of fishing rights was that they were a simple extension of rights in the land on the river bank, with the river being divided evenly between the people on the two banks. The evidence from Māori in the Native Land Court and elsewhere indicates that the balance between river or fishing rights and land rights was much more even, and that formal dividing lines down the middle of the river were rare. Rather, it seems that people usually constructed weirs in parts of the river to which they had easy access — in some places this would be on their side only, in others it might stretch across the whole river. It also seems that where two different hapū had fisheries in the same part of the river, the rights of each to their respective weirs were known and respected.

The sum of the evidence presented to the Native Land Court in the nineteenth century and the various judicial bodies which examined the Whanganui River in the twentieth century suggests that land rights and fishing rights were not necessarily tied tightly together. While most people associated their hapū or personal fishing rights with their residence on the bordering land, or the use of nearby land resources, there were also many instances of people consciously rejecting such associations. This potential for the separation of land and river rights was seen in the later claim to the bed of the river, founded on the association of the river with all of the Whanganui iwi via the three river ancestors Hinengākau, Tamaupoko and Tūpoho. This claim was in clear and open contrast to claims of 'ownership' of the land, which were traced to myriad other ancestors of the different hapū and iwi of the river; the three river ancestors were barely mentioned in the Native Land Court in the nineteenth century. The concentration on the river as a unitary entity, subject to numerous different use rights which were all held under the same

[162] Metera Te Urumatu, Tawhitinui, 8/5/1900, MB 44 pp.246-247; Hori Pakehika, Te Tuhi, 10/7/1895, MB 26 pp.27-29; Pita Te Rahui, Tawhitinui, 7/11/1900, MB 46 pp.125-126

original *pūtake* or source of rights, was in stark contrast to the accepted fragmentary approach to the lands on the banks of the river in the initial Land Court investigations.[163]

Property rights in the Whanganui fishery

A theme which recurs throughout many of the aspects of fishing rights so far discussed is the nature of the property right in different types of fisheries, and property rights have already been examined in relation to many of these issues. For example, in the earlier section dealing with hapū rights versus whānau or personal rights, it was noted that many Land Court witnesses distinguished between general hapū 'ownership' rights and more restricted personal usage rights. The issue of property rights was also an important aspect of the investigation of the relationship between fishing rights, the river, and the land on the river banks. The general courts concentrated on this in the twentieth century cases, as they examined whether Whanganui Māori could be said to have 'owned' the river under Māori custom. The distinctions between the types of interests included in a usage right and an ownership right respectively are also important for an understanding of the processes of control and management of the fisheries resource.

As elsewhere, fishing rights in the Whanganui River were described in a range of ways, from a simple usage right to full 'ownership'. But as has been emphasized before, it is difficult when working from Court minutes kept in English to determine whether these differences in language are due to genuine distinctions made by Māori witnesses, or simply a reflection of the great gap between Māori and Pākehā concepts and modes of expression. Native Land Court interpreters could not but describe Māori rights in the language of English property concepts, and they may have been influenced further by contemporary views of Māori fisheries and property rights.[164] This was certainly the case with judges. Even after hearing evidence which almost completely supported the idea of fisheries as a fully-fledged form of property, Judge Browne found in the Whanganui River Bed case only that: "the tribes or hapus that owned the land on the

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[163] See pages 338-338,353,378-379 *supra*. The Native Land Court process also encouraged this contrast, as the block-by-block approach of the Court in the nineteenth century left little place for the discussion of the rights of the iwi as a whole to the river.

[164] See pages 126-127,129-130 and note 123, pages 317-318 *supra*.

banks of a stream or river had ... the exclusive right to construct eel weirs or fish trips in its bed [and] exercise rights of ownership over it."[165] Nevertheless, it is useful to analyse the records we do have to see if any patterns do emerge.

While claims to 'own' or 'possess' land were common in the Whanganui Land Court, the language of outright ownership was not applied so often to fisheries, although many fishing sites such as *pā tuna* and *utu piharau* were said to 'belong to' hapū, groups of people, or individuals. In many cases, people would say that a particular ancestor had 'owned' a piece of land, and then go on to name the fisheries also associated with that land and ancestor, without making any statement as to the nature of those fishing rights.[166] Sometimes possession or ownership would be implied in the grammar of the English translation, as in the statement, "there was a 'pa tuna' of Ruamokai's at Matatara called Te Horo."[167] Presumably this corresponds to a Māori possessive phrase such as 'he pā tuna no Ruamōkai', but without a verbatim transcript it is impossible to be certain as to how these types of rights were originally expressed in Māori.

The language of ownership was certainly used to refer to fisheries in the twentieth century investigations of the river. At the Royal Commission, Hekenui Whakarake (who gave his evidence in English) spoke of the builder of a *pā tuna* being its "boss" or "owner", although he did go on to say that it was actually the hapū that "owned" the land and the fishery, and the people who worked the fishery was "doing that job, for the hapu." Earlier, in the Land Court, his fellow claimant Wharawhara Topine had said, "The Wanganui tribe owned the River at the time of the Treaty of Waitangi." Kuki Tautahi, a leading kuia of Ngā Rauru, added that *pā tuna* "belonged to" those who had built them.[168]

Sometimes fisheries were said to 'belong to' a hapū or group of hapū, but to be 'used by' particular members of that hapū. In the Kaitangata case, Taeawa Te Ope talked about "marks [of occupation] in the river." Amongst these were different named *pā tuna* and *utu piharau*, including the *pā tuna* at Matawhero: "Matawhero an eel weir, Hinearo worked there and

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[165] Judgment, Whanganui River Bed, 20/9/1939, MB 100 p.227. Judge Carr of the Maori Appellate Court recognized that there were difficulties in applying English notions of land and water ownership to Māori customary tenure: Judgment, Whanganui River Bed, 20/12/1944, Whanganui Appellate MB 11 pp.114-116

[166] *e.g.* Hoani Mete Kingi, Pungaharuru, 30/8/1888, MB 13 p.415

[167] Ratana Te Urumingi, Matataranui, 6/6/1870, MB 1C pp.301-302

[168] Commission Proceedings, pp.S.2,U.1,U.3; Wharawhara Topine, Whanganui River Bed, 3/11/1938, MB 99 pp.259,264; Kuki Tautahi, ibid. 19/5/1939, MB 100 p.203

so did my elders & I have done so too.... These fishing places belong to N. Hinearo & we fish there still."[169] While the fishing rights of Hinearo and her descendants were always indicated by the term 'worked by', when Taeawa discussed the rights of the hapū as a whole he said 'belong to'. Likewise, when discussing rights at the Te Puha eel weirs, Rini Hemoata always said that individuals 'used' or 'worked' the weirs, while they were 'owned' by "the Tararoa people" (descendants of the *pūtake* ancestor Tararoa) as a whole.[170]

In other instances 'belongs to' and 'used by' were used almost interchangeably. The weir in question might be said to 'belong to' a particular individual, but to be 'used by' a wider range of people. At Tawhitinui, Metera Te Urumatu said that he and companions had "used" or "worked at" a number of fisheries and cultivations, then went on to say:

> ...we have eel weirs in the Wanganui River at a place called 'Kaiwakamataku between Moutoa & this block. Wahanui name of weir.
> Taura Raira same place Waimarino at same rapid belonged to Arama Tinirau the elder, Taura Raira belongs to Waka Pene, Waimarino belonged to Kerei these were all people of my party.

In this case Metera did not seem to be making any conscious distinction between the different fisheries he used or worked and the fisheries that belonged to him and others. Elsewhere on that block, Poma Haunui said, "I know of the eel weirs at Haumoana there were many owners beside Te Reimana. As to the Wanganui weir I saw Reimana & Paora using it." He then listed other weirs "worked" or "used" by other people, and added, "The lamprey weir across the Wanganui river belongs to the N' Toki".[171]

Fisheries were often discussed in the language of occupation or usage rights, implying some sort of secondary right dependent on the 'ownership' of the land or water, or the overright of a larger group. The use of the language of occupation in particular also reflected the twin emphases of the Land Court — *take* and *ahi kā.* In the Kaiwhaiki case, Karehana Tahau talked about the occupation and use of land and resources: "Otanepango is the name of a place a cultivation, fishing place, a large place. Three of the children of Rangituawaro occupied and used that place".[172] Another example of a fishery said to be 'used' rather than 'owned' or

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[169] Taeawa Te Ope, Kaitangata, 17/5/1895, MB 25 p.114

[170] Rini Hemoata, Whakaihuwaka Interests, 10/5/1898, MB 37 p.293

[171] Metera Te Urumatu, Tawhitinui, 7/5/1900, MB 44 p.241; Poma Haunui, ibid. 16/7/1900, MB 45 pp.328-329. See also Kirihana Rupuha, Te Tuhi No. 3, MB 26 p.165; Werahiko Aterea, Tawhitinui, 5/6/1900, MB 45 pp.100,113-114; Arama Tinirau, ibid. 25/6/1900, p.208; Pita Te Rahui, ibid. 2/8/1900, MB 46 pp.93-94

[172] Karehana Tahau, Kaiwhaiki Nos 1 & 2, 12/1/1898, MB 36 p.226

'possessed' was the Te Mairi *utu piharau*. "The Te Mairi lamprey weir was used by all the desc[endants] of Tutehomutu my father used it & Hoani Tumango & others." Other people in this case who discussed this and other weirs also talked about them being made and used by certain people, not owned by them.[173]

The Native Land Court requirement for claimants to demonstrate both a valid *take* and occupation in turn demanded the demonstration of some form of 'acts of ownership', analogous in many ways to usage rights. The use of fisheries was commonly put forward as an act of ownership to prove ownership of the land in question, along with other forms of resource exploitation and land use such as housing and *wāhi tapu* or sacred sites. People were aware of this need to demonstrate acts of ownership even in the early cases in the area. In 1869 Ratana Te Urumingi discussed his claim to Pourewa through Ngāti Tumango and the ancestor Te Amio. In addition to Te Amio's "possession" of the land and his use of *pā tuna*, Ratana Te Urumingi said, "My grandfather Te Kaho o te rangi 'mahi tuna' at that pa tuna — the acts of ownership."[174] Reneti Tapa made a similar statement when introducing the claim of the Ngāti Rangipō hapū to part of the Tokamaru block: "I claim on behalf of my hapu to have an interest in this land.... We cultivated & exercised other rights of ownership in catching rats eels &c."[175]

People in the Court saw squatting, or the unauthorized use of a fishery, as reflecting only the most tenuous form of property rights. One of the major developments in freshwater fishing rights over the course of the nineteenth century was the increased use of fisheries and other resources by those who did not have a clear *take* to do so. This was usually described in Māori as *he mahi noa iho*, or 'mere work or use'. The increasing prevalence of squatting was a direct consequence of the massive fall in population throughout the century (especially the loss of elders with the best knowledge of traditional rights), the migration of people away from isolated areas, and the disruption to traditional resource usage caused by increased participation in the Pākehā world. In early cases in the Whanganui area, *mahi noa iho* was usually alleged by rival parties in the Court.[176] However, by the 1890s and twentieth century people were admitting more freely

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[173] Rahera Tiweta, Kahakaha Subdivision, 28/9/1894, MB 22 p.160; Hare Te Apa, ibid. 29/9/1894, pp.185,194. See also Karehana Tahau, Kaiwhaiki Partition, 8/12/1896, MB 36 p.132

[174] Ratana Te Urumingi, Pourewa, 18/81869, MB 1C p.291

[175] Reneti Tapa, Tokamaru, 4/3/1876, MB 1F p.21

[176] *e.g.* Hakaraia Korako, Patupa, 6/9/1870, MB 1C p.351; Heni Ratana, ibid. 30/1/1879, MB 2 p.177. See page 366 *supra*.

that they or their relatives had used fisheries without a proper *take*. It was sometimes implied that people were using a weir without a right because it had been abandoned by others. Poma Haunui said of one rapid on the river, "We saw Te Reimana & Te Kauau working at Tatamoana, they used it because no one else was doing so." Andrew Anderson confirmed that by the 1930s rights to fish on the river were "open because there are not many natives on the river. When there were a lot of natives on the river as in the early days they could not [fish where they liked]."[177]

Aspects of management and control

The distinction between the broader 'ownership' rights of the hapū and more limited whānau and personal usage rights in fisheries suggests that there was a corresponding distinction in rights of management and control. Joint 'ownership' of a fishing area by the people of a hapū would require the presence of authority and a management structure to ensure the most profitable and sustainable use of the fishery, and the fair distribution of fish among that hapū. Where fisheries were subject to clearly-recognized whānau or personal usage rights, there was still a need for someone with authority to manage and control access to that fishery. This *kaitiakitanga* or guardianship function was most often attributed to chiefs, tohunga, and kaumātua, and was demonstrated in a variety of ways. Control over fisheries was demonstrated by powers of regulation such as *rāhui*, and by the ability to share out the fishery and its produce by allocation among the hapū or community, or to gift to outsiders. Even in the twentieth century, when it was argued that there was some sort of unitary iwi title to the river, no-one ever disputed that the right to use and control the fisheries was vested in a number of smaller groups and individuals.

Many instances were given in the Court demonstrating the more direct rights of control some individuals had over fisheries. Those with control were usually people of mana and ability in the community at large, although some seem to have carried extra influence because of their great skill and involvement in fishing. These people (most often chiefs or "principal men") could exercise their control in a number of different ways, such as regulation of access, imposition of

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[177] Poma Haunui, Tawhitinui, 16/7/1900, MB 45 p.328; Andrew Anderson, Whanganui River Bed, 18/5/1939, MB 100 p.192. See also Reone Maungaroa, Whakaihuwaka Interests, 10/5/1898, MB 37 p.293; Pene Te Rangihauku, Tawhitinui, 16/5/1900, MB 44 pp.328-329; Judgment, Whanganui River Bed, 20/9/1939, MB 100 p.227

rāhui, and control of distribution. Chiefs of great mana could also make gifts of fish or fisheries to outsiders, but any action which affected the interests of all those with rights in a fishery would require at least their tacit approval.

Te Keepa Tahukumutia, a descendant of the *pūtake* ancestors Uenuku Poroaki and Kurawhatira on the Whakaihuwaka block, gave the names of the different people who worked the six weirs in the Te Pua rapid. He then claimed some sort of vague overright for himself at these weirs: "I am the head of or Ariki of all these people & had rights at all these weirs." Unfortunately, he did not say exactly what rights his *ariki* status gave him, apart from a right to work at all six weirs. These weirs at Te Pua were also those which had been claimed by Potatau through the act of one of his ancestors in killing a man there. Rini Hemoata was another leading figure in the Whakaihuwaka area, descended from another key ancestor, Tararoa. He rejected Potatau's claim by saying: "Potatau did not work at Poroporoaki he was one of my young men I sent him there once to get birds with others."[178] If Rini and others had the power to direct their 'young men' to go birding, they would also have sent them fishing when needed.

Chiefs also regulated the fisheries by apportioning the joint fishing interests of the hapū or community under their control amongst the different whānau making up the group. Hekenui Whakarake gave an example of this process to the Royal Commission, as it applied to land resources:

> The Chief of the tribe, the sub-tribe, would tell the people, "Now, so many of you, you do this, cultivate it for that family" and the next family, and so on. Well, he used to get the stone out of the river and put it down on the ground to separate the family.[179]

Presumably the same process was also applied to the fisheries of the hapū, but with different weirs or fishing spots being allocated to different whānau or representatives of those whānau. As most of the high-yielding fisheries in the Whanganui were *pā tuna* or *utu piharau*, it would have been straightforward to assign particular people to particular fisheries. Hekenui also added that the control over and responsibility for individual *pā tuna* lay with those who had organized or directed its construction.[180]

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[178] Te Keepa Tahukumutia, Whakaihuwaka Interests, 9/5/1898, MB 37 pp.281-282; Rini Hemoata, ibid. 10/5/1898, pp.293-294. See pages 363-364,373-374 *supra*.

[179] Commission Proceedings, p.S.2

[180] ibid. pp.U.1,U.3. See pages 374-375,388 *supra*.

As well as managing the workforce of the community when it came to labour-intensive activities like fishing and birding, those with control over fisheries could also invite friends, neighbours, or guests to join them to fish. Eruini Rangiirikau of Ngāti Hinekōrako and Ngāti Te Puha o Te Rangi said of the *pā tuna* at Tawhitinui, "I never saw Reihana & wife working at Tawhitinui during those years [1860s] Except I know that Reimana invited Reihana to go & help him catch eels & do some work with him." Reimana was a *tuakana* cousin of Eruini and chief of a number of hapū including Ngāti Hinekōrako, Ngāti Te Puha and Ngāti Toki. He was said by Eruini to own the *pā tuna* at the Moutoa rapid. Eruini and others of his party said that Reihana Te Urumingi's own fishing rights were at the Rangiwakamataku *pā tuna* elsewhere on the block.[181]

Chiefs could also make a gift of whole fisheries and areas of land to other people, usually outside hapū or other chiefs. It seems that the terms of these gifts depended very much upon circumstances. While generally the granting of fishing rights or a whole fishery would boost the mana of the donor,[182] this might not apply if the gift were not made from a position of strength. For example, lands around Pūtiki near the river mouth were reserved from the initial sale of the mouth area to the New Zealand Company, and given over to the brothers-in-law Te Mawae and Hoani Wīremu Hipango for their assistance in completing the sale in 1848. Traditionally this land had been of value mostly for its access to the kahawai fishery in the summer months, but with the arrival of Pākehā settlers it became increasingly valuable for its access to the town across the river. An elderly man of Ngā Poutama, Hakaraia Kōrako, said that Hipango of Ngāti Tumango had better ancestral rights to the land, as Te Mawae of Ngāti Ruaka was originally from Rānana. He said that Hipango "gave" the land around the river mouth to Te Mawae and his Ngāti Ruaka people some time before 1840,

> ...because he [Hipango] had not enough followers to protect it from aggressors so he handed it over to Te Mawae who was a powerful man. It was given to Te Mawae absolutely and the only portion that Hone reserved for himself was this reserve. Hone Wiremu's mana ceased when he handed over to Te Mawae.[183]

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[181] Eruini Rangiirikau, Tawhitinui, 21/11/1900, MB 46 pp.207,214,217; Pita Te Rahui [brother of Eruini], ibid. 7/11/1900, MB 46 p.126; Take Take, ibid. 19/11/1900, p.188; Wikirini Te Tua, ibid. 4/12/1900, pp.296,305, 318. However Ārama Tinirau, one of the rival party descended from Hamama and Karara, said that it was in fact Reihana Te Urumingi who built and used the weirs in that area: ibid. 22/6/1900, MB 45 p.199

[182] See pages 15-16 *supra*.

[183] Ripeka Tauri, Pungaharuru, 10/8/1888, MB 13 p.348; Hakaraia Korako, ibid. 15/8/1888, pp.357-358,361-362

Many other people disagreed with this analysis, and said that Te Mawae's presence on the land was accounted for by his marriage to Hipango's sister, and that because of that the mana of the land did still lie with Hipango.[184]

A man called Te Kere Ngātaierua also claimed a share in the Pungaharuru block, saying that he had been gifted a portion of the land by Hoani Wīremu Hipango. His claim was rejected by Te Mawae's daughter Rīpeka Tauri, who said that he had merely been allowed to use land there because he was a distant relative and had been subject to ill-feeling on his own lands. No-one questioned Te Mawae's right to invite one of his relatives onto land under his control in these circumstances. While Te Kere's rights might not have been challenged in a continuing traditional setting, the others with an interest in the land clearly did not feel that rights relying on the good-will of a chief rather than a formal gift were of sufficient strength to justify permanent inclusion in a Crown title.[185]

Land on the banks of the Mangapapapa stream on the Te Tuhi block was the subject of a gift after warfare. But in this case, the land was given as *utu* for blood shed on it in the course of a battle. The chief Haimona Te Ao o Te Rangi, a claimant for the land by descent from Kahukura and Takotohau, said that the land north of the Mangapapapa Stream belonged to the rival Ngāti Patutokotoko people. Haimona told how there was a battle near there, during which the Ngāti Patutokotoko chief Pēhi Pakoro was speared, and:

> ...they (Patutokotoko) gave back to us the land north of the Mangapapapa because I brought some food to wipe out the blood shed on it. It was Tamakore the sister of Kaiparo who brought the food & the Patutokotoko tribe return to us the land north of Mangapapapa....
> I am not clear about the return by Pehi Pakoro of the land south of Mangapapapa but he did return the land north of it because food had been brought to wipe out the tapu of blood shed caused by the spearing of the sacred person of Pehi Pakoro a chief of rank.[186]

This is a curious incident, as normally when the blood of an important chief was shed, it would tapu the land to him and his family. However, there seems to have been no real desire on the part of either party for the land to change hands, which would perhaps prolong the fighting, or be inconvenient for the newcomers to keep up their rights to that land by using it regularly. It was

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[184] Topia Turoa, Pungaharuru, 18/8/1888, MB 13 pp.392-393; Hori Kerei Paipai, ibid. 28/8/1888, pp.397,399

[185] Te Kere Ngataierua, Pungaharuru, 14/8/1888, MB 13 p.349; Ripeka Tauri, ibid. pp.351-352; Wiremu Tauri, ibid. 16/8/1888, p.372; Judgment (Judges Ward & Scannell), Pungaharuru No. 3, 31/8/1888, MB 13 p.425

[186] Haimona Te Ao o Te Rangi, Te Tuhi, 26/6/1895, MB 25 pp.326-327. Cooked food, which is *noa* or antithetical to tapu, was commonly used to *whakanoa* or lift the tapu from places where such incidents had occurred.

Haimona's people who acted to lift the tapu, and by subsequently returning the land (and its adjacent fisheries) Pēhi Pakoro increased his own mana. By accepting the return of the land, Haimona's people acknowledged Pēhi Pakoro's rights and his increased mana, but were able to keep their land.

Another form of making a gift was the hosting of a feast or *hākari*. The hosting of a *hākari* required access to huge amounts of food and the labour to gather and prepare it. This demonstration of wealth was used to reinforce the mana of the donors, to demonstrate their rights to use the resources of the land, and to form a closer relationship with the *manuhiri*. It also required the *manuhiri* to reciprocate the *manaakitanga* of their hosts, or preferably to outdo it.[187] Hoani Tumango gave an example of a feast given by the Ngāti Hinearo people at Kaitangata:

> [A *hākari*] given to Rai by Uruhau and Rangiwhakahaua, this was when Rai married Mokomoko. Rai was an elder sister of Hakaraia. Mokomoko was a N. Apa. Mokomoko sent some eels to the Wanganui people, & they in return gave "Hua hua" [potted birds and game] to him, & the return feast of 'huahua' was called Nga moana erua because the eels forming first feast were caught in two lakes, the feast of eels was held at Te Arero o te uru & so was the other one because they could not carry the food to the N. Apa.[188]

Uruhau and his *tuakana* cousin Rangiwhakahaua were both mentioned in connection with fishing rights elsewhere on the block in question, and were in possession of sufficient rights to assemble such a large amount of food. Mokomoko's initial gift of eels required a more substantial response, which was indicated by the fact that the Ngāti Hinearo were unable to carry the *huahua* to Ngāti Apa, even though Ngāti Apa had been able to carry the eels to them.

Other people gave examples of eels and fish being gathered on the block under investigation and then used as a gift or for a feast. In all these cases people sought to reinforce their claims of ownership by demonstrating their right to gather and give away fish. Rangiwaka-teka of Ngāti Toki claimed the *utu piharau* at Te Aua, saying he had worked it along with his brother Tawhiri, distant cousin Atarea Te Kaka, and other relatives. He added that:

> This Te Aua lamprey weir is the most celebrated in the Wanganui river. Atarea got a lot of lampreys at this Weir. Three baskets full and made a present of them to N. Hine of Ranana to return a marriage feast given when Mata Kaihoe married Hanau

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[187] See page 176 *supra*.

[188] Hoani Tumango, Kaitangata, 8/5/1895, MB 25 p.41. See also op cit. p.39; Taeawa Te Ope, ibid. 17/5/1895, p.114.

> te Puki... Atarea continued to work there till the River trust interfered & made it unsuitable.[189]

Once again, the act of giving fish in return for an earlier feast both satisfied the social requirements of *utu* and reinforced the claims of the donor to have a right to use the fishery in question.

Some people put forward less clearly defined rights to control fisheries on the basis of their own or ancestral mana. These claims of control were usually much less direct than those based on being a 'chief' or 'principal man', although the two concepts were very closely connected. At Tawhitinui, Eruini Rangiirikau of Ngāti Hinekōrako and Ngāti Te Puha o Te Rangi linked the two: "I claim an interest in this land. Ancestry, & occupation, Rangatira, mana, over the land & over the people, My ancestors are Hinekorako and Te Puha o te Rangi."[190] Further up the river on the huge Waimarino block, Hakiaha Tawhiao appeared for Ngāti Hāuāroa, Ngāti Reremai and Ngāti Hinewai. He said that the prominent Ngāti Hāuā chief Topine Te Mamaku had "a large claim" on part of the land around Retaruke because, "Topine Mamaku's mana is above all those who own that portion of the block." The sort of mana claimed by Raihania Takapa at Morikau was more specific — "My rights are ancestry, ahi-ka. Mana tiaki a nga tupu[na]" (the guardianship mana of the ancestors) — but he did not relate this mana directly to any particular fishery or other resource.[191]

The introductory statement of Toma Taiwhati, leading witness for Ngāti Toki in the Puketōtara case, gives an indication of how many kaumātua expressed their land and fishing rights, their mana, and their rights of control in the initial stages of an investigation of title:

> I belong to Ngatitoki hapu. I claim through my ancestor Toki [gives whakapapa from Toki, five generations back].
> Toki lived on the land and all have lived on the land down to myself....We had bird catching places and creeks where are caught eels, no battle ground. My mana goes over the parts I have cultivated, my people have claims all over. I claim with N. Hinekorako, Ngatipuku there are other claims of other hapu's. I don't want to apportion any particular parts of the land as we claim together.[192]

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[189] Rangiwakateka, Tawhitinui, 17/7/1900, MB 45 p.345. See also Pita Te Rahui, ibid. 2/8/1900, MB 46 p.95; Commission Proceedings, p.Q.1

[190] Eruini Rangiirikau, Tawhitinui, 21/11/1900, MB 46 p.203

[191] Hakiaha Tawhiao, Waimarino Subdivision, 31/3/1887, MB 13 p.132; Raihania Takapa, Morikau, 18/1/1899, MB 39 pp.299,306-307. See also Mata Kaihoe, Tawhitinui, 10/12/1900, MB 46 p.325; Atarea Taiwhati, Kauaeroa, 10/1/1901, MB 47 p.16; Hekenui Whakarake, Commission Proceedings, pp.Q.5-R.1

[192] Toma Taiwhati, Puketotara, 3/8/1880, MB 3 p.46. The case was largely unopposed and seventeen people of the various hapū named by Toma were included in the title. Ibid. p.55.

The claims of Toma and the people he represented were firmly linked to their ancestor Toki. Toma expressed his own rights of control by tracing his descent from Toki, by stating that he had the mana over the fisheries and cultivations used by him and his people, and by implying that he had the right to apportion these resources amongst the people of his hapū if he thought it suitable.

A rare example of the mana of a chief being related directly to a fishery and fishing rights was given by Werahiko Atarea, when discussing the rights of his relative Reimana of Ngāti Te Puha o Te Rangi:

> Reimana had mana over the eel pas at the Haumoana rapid I saw him working there Tarewa & Ema do not use these eel weirs. Eruini & I have used them....
> Reimana had mana over the eel weirs & was an owner of Te Punga the adjoining land. I don't know any desc[endants] of Toki who had an eel weir but Toki's desc. used these weirs as well as other people.[193]

While Werahiko and other people, including those of the closely related hapū Ngāti Toki, had usage rights at the weirs in question, Werahiko reiterated that the mana (and by implication the control) of those fisheries rested with Reimana alone.

Chiefly mana carried with it both spiritual and temporal or social authority, which could be used to impose *rāhui* over fishing resources. No instances were given in the Whanganui Land Court illustrating the actual process of imposing *rāhui*, but examples were given of incidents which led to *rāhui* being placed over fisheries. One mentioned by a number of people occurred during the fighting at Moutoa in 1864. A man called Mohi was wounded in the battle and fled down the river. Bleeding, he climbed onto the Repe Repe *pā tuna* in the Tatamoana rapid, thus making it tapu with his blood. Afterwards the *pā tuna* could not be used and it was abandoned. Presumably the shedding of blood at the weir was so well known that it was not necessary for the owner of the weir to formally declare a *rāhui*.[194]

The Whanganui River fishery — a summary

The discussion of fishing rights to the Whanganui River in the Native Land Court in the nineteenth century, and in both the Land Court and the general courts in the twentieth century,

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[193] Werahiko Atarea, Tawhitinui, 7/6/1900, MB 45 p.113

[194] Poma Haunui, Tawhitinui, 16/7/1900, MB 45 p.329; Pita Te Rahui, ibid. 2/8/1900, MB 46 p.93; Eruini Rangiirikau, ibid. 21/11/1900, p.207. See also pages 179,394-395 *supra*.

drew out a number of key themes. Perhaps the most noticeable of these was the flexibility of concepts of usage and 'ownership' rights, depending on the context of the discussion and the scale of rights being considered. In the twentieth century, as emphasis moved away from the transition of traditional Māori land tenure to the Pākehā model of landholding, the attention of both Whanganui Māori and the Pākehā judicial system turned back to the issue of the river itself. English legal concepts required that any Māori claim to the river be made in the form of a claim to ownership of the river bed. When Whanganui Māori did take their claim to the bed of the river to the Native Land Court (and as it went on to the general courts), it was for iwi ownership of the river as a single entity, based on descent from three key ancestors who had traditionally been associated with river rights.

Yet, on the surface, this approach conflicted with that heard in the Land Court in the nineteenth century. At that time, when typically a few hapū argued the disposition of a few thousand acres, claims were not made on such a wide scale. Fishing rights were usually related closely to the land rights of the hapū, and by extension fishing rights were traced from the *pūtake* ancestors put forward in each case. As land was further divided and cases were heard in more detail, people discussed their fishing rights in more detail. Frequently it was said that the *pā tuna* and *utu piharau* in a particular rapid or stretch of river were 'owned' by the hapū, but that usage rights in particular weirs were shared out amongst different sub-sections of the hapū. These sub-sections could be whānau or other kin-based divisions; or they could be communities, made up of the people living closest to the weirs. Within the hapū and the community there would be senior people whose mana and expertise meant that they oversaw the allocation of rights, the construction and maintenance of weirs, and the distribution of the catch.

While many Pākehā involved in the legal system in the twentieth century had difficulty in reconciling this twin hapū- and iwi-based approach, for Māori there was no great conflict. Overlying the practical application of hapū rights were the overarching rights and obligations of the iwi as a whole — to oversee the actions of its composite hapū and to be the ultimate *kaitiaki* of the river, to protect it from outside aggressors, and to embody and stand for of the mana of the river. The interests of the iwi as a whole were indicated by the *whakatauākī* 'te taura whiti a Hinengākau', the river being the plaited rope of Hinengākau that binds Whanganui together. In the context of nineteenth century Land Court claims, these iwi rights lay behind the case of every hapū party, and it was the day-to-day control and usage rights of the hapū and their composite

parts that needed to be discussed. The two approaches balance rather than conflict with each other.

The twentieth century cases also brought out a divide between land rights and water rights. Although there was usually a high degree of correspondence at hapū level between the 'ownership' of land on the river banks and the 'ownership' of the fisheries in the adjoining stretch of river, this was not automatic and it did not always apply to rights considered at a more personal level. The numerous rapids in the river determined that good fisheries were not evenly distributed along the length or the width of the river; and as a result of this and the complex inter-relationships between hapū along the densely-populated river valley some people and some hapū had rights at a short distance from their usual *kāinga* and hapū lands. The kahawai fishery at the river mouth and the tunariki fishery at the Ōhura mouth are also examples of fisheries and fishing rights which were divorced from the surrounding land, although in the case of the river mouth fishery the land itself was unoccupied outside the summer fishing season.

Another theme seen in the Whanganui records is the role of gender in claiming fresh-water fishing rights. In the nineteenth century, Pākehā observers usually wrote that rights were passed for the most part down the male line of descent, and that women had limited rights except where their fathers and brothers chose to make special allowances for them.[195] It would seem from the evidence given in the Whanganui Land Court that this interpretation had more to do with the contemporary property rights of English women than Māori custom. Rights to fisheries based on *take tupuna* were regularly traced from female as well as male ancestors, or down lines which included women as well as men. Women were also said to have 'owned' resources like weirs in their own right in both ancestral and contemporary times, even though there were traditional prohibitions against female involvement in highly tapu activities like the building of large weirs. In these cases a woman's husband would often exercise his wife's rights, but always in her name.

The overriding impression given by the study of the records of those Pākehā institutions that dealt with the Whanganui River and its fisheries is that of a complex web of rights and associations which was crudely pounded into shape to fit a simplified Pākehā model of Māori tenure. Māori spoke of personal and whānau usage rights, a stronger proprietary right in the hapū and management rights in hapū leaders, and a symbolic and spiritual overright in the iwi which was

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[195] See pages 54-55,70-71,80 *supra*.

seen most clearly at times of outside threat to the mana of the river. Pākehā officials, usually deeply steeped in English law, struggled to reconcile this. The entire Land Court process only made matters worse, with its emphasis on discrete surveyed blocks of land, the financial barriers to a thorough investigation of resource usage rights among members of a hapū, and its focus on the hapū as the key unit of Māori society. The commonest Pākehā response was to affirm the rights of hapū at the expense of larger and smaller groups.

CONCLUSIONS

The established model of Māori freshwater fishing rights is, in many respects, a highly simplified one. Most writers have considered freshwater fisheries in the context of a wider discussion, such as sea fisheries issues, Treaty of Waitangi or legal claims to areas of land and waters, customary Māori land tenure, customary Māori resource management, or anthropological studies of Māori culture. This thesis has sought to strip back the interpretative effects of these contextual environments by exploring the evidence given by Māori themselves on the subject of their fishing rights in largely nineteenth century fora such as the Native Land Court. This evidence has then been used as the basis for a detailed analysis of customary Māori freshwater fishing rights in the chosen regions.

The analysis of Māori evidence in such detail is necessary not only to communicate the full complexity of customary Māori freshwater fishing rights, but also to demonstrate the nature of Māori understanding of their own fishing rights, and to convey what it was that Māori themselves saw as significant. Many of the generalized Pākehā interpretations of the past were implicitly based on a similar substantial body of Māori oral evidence, but the Māori voices and interpretations were not acknowleged. This is no longer a valid methodological approach. An exploration of the Māori evidence and the underlying interpretations is essential to the development of a more complete analysis of the nature and extent of Māori freshwater fishing rights. There has also been a need for an analysis focussed primarily on freshwater rights, not one examining them only as a sideline to general issues of sea fishing rights or Māori tenure, or as an exemplification of wider principles. The aim of this thesis has been to extend the understanding of customary Māori freshwater fishing rights by using Māori evidence as the basis for a detailed analysis.

However, the use of evidence from an environment such as the Native Land Court provides analytical difficulties of its own, as the legislative framework and practices of the Court and the predilections of individual judges appear to have influenced the ways in which Māori expressed their fishing rights in the Court. This has been countered to some degree by an in-depth examination of the political, legal and intellectual climate within which the Native Land Court operated. While this allows a layered analysis of the Court evidence, and a recognition of

the impact of the filters imposed by the Court process, it does not provide an insight into those aspects of freshwater fishing rights which were reinterpreted by Māori in the Court to fit with existing Pākehā expectations and interpretations. In this respect the picture of customary fishing rights that has been built up over the last two decades provides an important starting point and framework for deeper analysis, as it draws heavily on both Māori knowledge and detailed research of an academic nature. The following précis of the nature and extent of customary Māori freshwater fishing rights, as explored in the case studies, draws on these various strands.

Many issues and key aspects of rights were discussed by Māori in the Native Land Court in all three regions examined. The function of the Land Court was to investigate customary ownership of the land, and then determine which people or hapū had demonstrated sufficient rights to be included in a Crown-derived title. This dictated that Māori in the Court would attempt to demonstrate their full range of rights over any block under investigation as a whole. The Court had a well-known preference for rights based on physical occupation over at least several generations, and so the antiquity and continuity of rights was an important part of most claims. Land rights and occupation were the primary concern of the Court, and in almost all cases fishing rights were discussed and asserted under this land rights umbrella. Nevertheless, there were sufficient investigations on blocks which had substantial fisheries and which were argued in close detail to allow a picture of freshwater fishing rights to be built up from the Court evidence.

One issue common to all Land Court cases and discussions of fishing rights was that of derivation of title. By far the most commonly claimed *take*, or source of title and rights (which was consequently the *take* most favoured by the Native Land Court) was *take tupuna* or ancestral right. In most cases, hapū and individuals could trace their whakapapa and *take tupuna* back to very early ancestors, but this usually applied only to large, general areas of land; rights derived from *take* of such antiquity were usually expressed as hapū or even iwi rights. Where rights in specific fisheries, even hapū rights, were derived through *take tupuna*, the ancestors were generally much closer. Very few specific fishing rights were claimed through *take tupuna* from ancestors more than eight or so generations antecedent to the claimant.

Hapū rights derived from *take tupuna* to fisheries in a general area usually went hand in hand with similarly-derived hapū rights to the adjacent land, and were closely tied to descent from key hapū and iwi ancestors. Sometimes hapū rights were traced from two different lines — one

of greater antiquity but lesser political significance, and the other from more recent migrants into the district who had absorbed and subjugated the earlier inhabitants. This was the case in Wairarapa, where some general rights were traced from both the older Rangitāne and more recent Ngāti Kahungunu iwi (Rangitāne retained an independent presence in some parts of the district); and in Taupō, where Ngāti Tūwharetoa superseded and intermarried with Ngāti Hotu and other iwi. Hapū did also claim ancestral rights at specific fisheries, such as large eel weirs or river mouths. These too were based on *take tupuna* through an early ancestor, often the eponymous hapū ancestor.

In the Court, personal or whānau rights through *take tupuna* were established through whakapapa showing links to ancestors who had acknowledged rights to the fishery, by demonstrating that intermediate ancestors had also exercised these rights, and by showing that the claimant had freely exercised his or her rights. Whānau and personal rights to fisheries through *take tupuna* were almost always rooted in a wider ancestral right in the larger descent group, even if the practical use rights of the wider group were dormant or secondary to the rights of the whānau or household. These smaller-scale rights in particular fisheries were also often traced from ancestors more recent than the hapū ancestor, and although use rights were derived from and restricted to this intermediate ancestor the place of the hapū and hapū ancestor was still acknowledged.

While *take tupuna* was the most important *take* or source of rights, other *take* were regularly advanced to the Court as the basis of fishing rights. The most common of these, and the two other *take* recognized by the Court as a valid source of title, were *take raupatu* or conquest, and *take tuku* or gifting. *Take raupatu* properly refers to conquests by outside aggressors or invaders, but it was also used in the Court to refer to the wresting of rights on a much smaller and more local scale. In those cases where large areas of land changed hands through conquest, to the complete exclusion or subjugation of the previous occupants, the fishing rights within that area also passed to the new occupants. However, fishing rights could also change hands without a corresponding change in occupation of the adjacent land. Examples were given to the Native Land Court in both Wairarapa and Whanganui which referred to the deliberate seizure or attempted seizure of a fishery rather than land or land and fisheries. This was usually achieved by using the fishery without authorization and then fighting off its previous owner, or by killing or driving away the owners while they used it. Where successful, this led to the establishment of a separate right to the fishery, which was usually passed down to the descendants of the original

aggressor. This scenario appears to have been the origin of a large proportion of the non-territorial rights (or rights exercised without a corresponding right of any sort to the adjacent land) discussed in the Court.

The Native Land Court recognized *take tuku* as one of the three preferred *take*, but claims to fishing rights as the result of a formal gift were relatively uncommon in the Court. Some examples given were fishing rights acquired as part of a large area of gifted land, such as the granting of the land around Wairarapa Moana, and the associated lake mouth fishery, to Te Rangitāwhanga of Ngāti Kahungunu by his Rangitāne uncle. Fishing rights might also be granted as part of a 'peace package' after extended fighting between hapū. Another type of gift which was discussed was not the gift of fishing rights to outsiders, but the gift of land, fisheries and other resources to daughters who married out of the area. Normally it was held that the rights of people within their own hapū were diminished or lost if they left the district, unless they returned regularly to exercise the rights or there was some such formal gifting arrangement. Examples were given in Wairarapa of land being gifted to a woman who had married into another hapū, for the future support of her unborn child; while in Taupō the large hapū Ngāti Parekāwa traced their rights not only from their descent from the iwi ancestor Tūwharetoa, but also from the gifting of a large portion of land to their ancestor Parekāwa by her chiefly brother.

Freshwater fishing rights could also be lost or acquired through the workings of the principle of *utu*, or reciprocity. It was sometimes said that a particular person had lost their fishing rights as a punishment for some sort of social infraction. Adultery was the most frequently cited; also mentioned was the improper use of *mākutu* to harm another. The victim of the offence or their family would often seize the property and rights of the offender as retribution for such an offence. The offender would often lose not only his personal rights, but also his descendants would lose their right to succeed to these rights. If the person was expelled from the community they would also lose their share in the rights of the hapū. However, some people seem to have restricted the loss to their individual rights and protected the rights of their descendants by giving up their rights voluntarily, without force having to be used.

Another source of rights in fisheries was intermarriage and other horizontal kin relationships. This was not formally recognized by the Native Land Court as a legitimate *take*, granting rights of sufficient strength to be included in a Crown-derived grant, unless there had been some sort of formal arrangement (which was then usually categorized as *take tuku*). Some Wairarapa people referred to these rights as *take whanaunga* or rights through relationship. They

arose through the use of fisheries belonging to the spouse of a relative who had moved away on marriage, or that spouse's hapū; or through the use of the resources of relatives who derived their rights through a different descent line to that shared by the two groups. It would be expected that resources were commonly shared in this way on a temporary and informal level, with seasonal reciprocations, without enforceable rights necessarily passing to the invited visitors. Such rights could be revoked at any time, and required ongoing goodwill and reciprocity between the parties to be maintained. More concrete rights were established in some fisheries through repeated participation without arousing the objection of those with a right to use the resource. Some such rights were also formalized through well-known public invitations, which were often part of chiefly marriage arrangements. As time went on, bonds between the two hapū were often strengthened by further marriages or migrations and the respective rights of the two could begin to blur. *Take whanaunga* was another source of non-territorial rights, such as those of some Wairarapa hapū who travelled annually to the mouth of Wairarapa Moana to share in the rich eel migration fishery of hapū related to them by marriage.

People could also acquire rights through the discovery or development of a resource, and such fishing rights could be passed down to the descendants of the original developer. Examples were given of such circumstances as the discovery of a rich fishing ground in Lake Taupō, which was then passed down to the descendants of the discoverer, and of eel weirs being passed down to the descendants of the original builder. These developed resources were often located within the general fishing area of the hapū to which the developer belonged, but the act of discovery or application of labour to the resource seems in most cases to have led to a more restricted fishing right being recognized by other people of the hapū. The act of discovery or development was often commemorated in the naming of the fishing ground or the weir after that person, or in the coining of an explanatory local proverb or *whakatauākī*, which was a continual reinforcement of their rights. Once established, such rights were subject to the same processes of *take tupuna* as other rights within the general hapū area.

The Native Land Court, and some modern writers who have based their research largely on Pākehā scholarship, have usually considered these different *take* as discrete and exclusive sources of rights. This Land Court codification of *take* also encouraged Māori in the Court to present their case as based on one or other of these *take*. However, this approach is more reflective of Court practices than of Māori custom, as the Court determined land ownership as of

1840, when New Zealand became a Crown colony. The few decades before 1840 had seen substantial migration and population displacement in many parts of the country, and this forced many claimants to stress rights derived through *take raupatu* and *take tuku* because of the weakness of their claims through ancestry or *take tupuna*, which the Court only recognized if it was of several generations' standing. From this, the Court drew the conclusion that *take tupuna* and *take raupatu* were very different and exclusive forms of title.

In traditional practice the different forms of *take* would blend over time — very few 'conquests' resulted in the complete destruction of a tribe, and the newcomers usually intermarried with the local people. Within a few generations, the tribe would take the name and political status of the newcomers, but retain kinship links with the older people through this intermarriage. This pattern is clear from the political absorption of some lines of Rangitāne by Ngāti Kahungunu, and Ngāti Hotu and others by Ngāti Tūwharetoa. Rights obtained originally through *take tuku* or *take whanaunga* were also subsequently blended and blurred through intermarriage, with the consequence that later generations could base their claims on both these *take* and *take tupuna*. The Land Court process interrupted this transformation in many cases and prompted artificial boundaries between *take*; although this mostly affected claims to general areas of land, it would also have posed difficulty for claimants who had fishing rights of informal and recent derivation.

Those people with recently-acquired rights also had difficulty proving *ahi kā* (literally, demonstrating that their fires had been long burning on the land). The Native Land Court placed heavy emphasis on *ahi kā* as the necessary corollary to any *take*, in order to prove ownership, and as a result most claims were based on a twin approach of accepted *take* and *ahi kā*. The Court also usually regarded the concept of *ahi kā* as identical to occupation, and believed that those who had physically occupied land and used its resources had a greater right to it than those who had solely exercised usage rights, with resource rights such as fishing rights not capable of conferring full ownership to the land. However, it is clear from Māori evidence in the Court that the customary concept of *ahi kā* was much broader, and encompassed use rights, even temporary seasonal use rights so long as they were utilized on a regular and recurrent basis. With regard to freshwater fisheries, this is best seen in places like the Whanganui River mouth and the bar of Lake Ōnoke, where the migration and seasonal movements of fish species meant that the fishing was substantial but of short duration. Hapū not normally resident there did have rights to come each year and share in the fishery.

Another major aspect of the derivation of title and rights was the transmission and inheritance of these rights. The orthodox view is that rights derived through *take tupuna* were passed from generation to generation in the case of the hapū or other large kin group, subject to the ongoing need for people descended from the hapū to demonstrate their *ahi kā* and keep up their association with that hapū. Fishing rights exercised on a smaller scale were similarly passed down to a child or children, or other close relatives. Once established, rights derived through *take raupatu* and *take tuku* were also subject to a similar process of inheritance. While this simple model of the transmission of rights provides a useful starting point for analysis, some aspects are poorly explained by it.

Ron Crocombe has observed that in most Pacific Island tenure systems, a person born into a kin group is born with a number of rights in the property of the group, both actual and potential. The realization of the potential rights then rests upon other factors such as occupation and use of the resource in question, participation in kin-group activities, and defence of the right from aggression.[1] In the case of Māori tenure and freshwater fishing rights, the key factors in establishing a right through the hapū or other tribal body were ancestry and participation. It is clear from the Native Land Court minutes that those who could demonstrate *take tupuna* through whakapapa, and also demonstrate that they had used a resource through this connection without opposition, had a right to share in and use that resource.

However, there was no established point at which lack of participation and distance of kinship connections resulted in the undisputed loss of a right. The Native Land Court-formulated 'three generation rule', which held that all rights were lost after an absence of three generations, seems to have been a Pākehā codification of informal Māori practice. While some people were rejected on these grounds by other Māori, this often reflected contemporary personality clashes or political tensions, or was based on the expulsion rather than voluntary departure of the ancestors concerned. In other cases, distant relatives with little history of participation were included in claims to the Native Land Court, demonstrating that potential rights could be revived by mutual agreement between the two parties concerned. Numerous people claimed rights in the Court on the grounds that they had been invited back onto the land of their ancestors by the chief of the tribe.

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[1] See pages 18-19 and note 45 *supra*.

The concentration of the Native Land Court on hapū claims to large areas of land has made it difficult to assess how small-scale rights, such as the use of a small *pā tuna* or eel weir by a whānau or a single household, were passed down the generations. For practical reasons, use rights to such low-yielding fisheries would not be passed indiscriminately to all descendants of the family. Accounts from both Pākehā writers and Māori in the Land Court suggest that the resources under the control of family heads might be deliberately redistributed amongst their children (and other close relatives such as siblings, nieces and nephews) at their death. There are some examples of brothers holding some fishing rights in common and some separately, indicating that a recent division of rights had taken place. Most of the instances of this practice of bequeathing property relate to chiefly families. It seems that those children who had moved out of the area permanently were only rarely included in these allocations, thus limiting the pool of potential successors.

Many nineteenth century Pākehā commentators wrote that these allocations were usually made to sons, brothers, and nephews, with women only rarely inheriting an interest in their own right. The Land Court evidence demonstrates that this interpretation rests more on contemporary Western interpretations of women's property rights than on Māori customary tenure. While it was often women who left their own hapū on marriage, those who stayed within their hapū kept their rights and could pass them on to their children. A woman may not always have been able to exercise her own freshwater fishing rights, as some activities like the building of large *pā tuna* were tapu and restricted to men, but even where these rights were exercised by her husband it was done clearly under her name. Evidence from Wairarapa shows that some daughters of chiefs inherited authority over freshwater fisheries ahead of or alongside their male cousins or even brothers; in Whanganui whakapapa given to the Court showing gender indicates that the children of the women of the hapū inherited similar rights to those descended in the male line. Many eponymous hapū ancestors (from whom hapū rights were usually claimed) were women, indicating that the inheritance of rights through the female line was an accepted part of Māori tenure.

While individuals, whānau and hapū all derived their rights under similar *take*, the actual nature of the fishing rights exercised by each type of group was different. Many earlier writers have seen iwi, hapū, whānau and individual or personal fishing rights as discrete phenomena, each containing a particular bundle of rights on a particular scale. However, the evidence

given in the Native Land Court shows that there were no clear boundary lines between the rights of large hapū and small hapū, between hapū and whānau rights, or between whānau and personal rights (that is, rights usually attributed to a single person, often a family head, but in practice also used by that person's household and dependents). Rather, there was a sliding scale of rights from the largest hapū down to individuals, with the attributes of each particular right being determined by factors such as the size of the group, the yield or potential yield of the resource, the political and social relationships of the group with neighbours and fellow fishers, the nature of historical use of and rights to the fishery, and individual personalities. It is impossible to say just what exactly characterized a hapū right, and how exactly it differed from a whānau right, but some generalizations can be drawn.

The definition of a group as a hapū or a whānau has also often come from the writer (including this writer on some occasions) rather than the group exercising the fishing right itself. This opens up the possibility that on some occasions writers have made incorrect assessments of the nature of the relationship of the group exercising the fishing right, or may have misunderstood valid but unusual self-definitions. For example, in Whanganui a few groups resembling hapū but not describing themselves by hapū names claimed fishing rights which were very similar in nature and extent to the fishing rights of their neighbours who identified themselves as hapū. The following generalizations as to the nature of hapū and whānau rights should be extended by default to those groups resembling hapū and whānau which did not define themselves as such, but which exercised or claimed rights in the nature of 'typical' hapū or whānau rights.

Hapū freshwater fishing rights were usually claimed over general fishing areas, containing more than one actual fishing site, or over particular fisheries of great wealth, such as lagoons or large *pā tuna* or eel weirs. Similar rights were also frequently jointly claimed by a number of closely-related hapū, and this overview of hapū rights also includes those multi-hapū rights. Hapū rights were almost always based on the use of the fishery by the eponymous hapū ancestor or another key *tupuna*. They were usually couched in terms of full proprietary rights, or ultimate title to the fishery, although a vague iwi overright has often been mentioned. While it is clear that residual powers of management (what Graham Butterworth has described as "*rangatira* rights")[2] did lie with the senior chiefs of the iwi, there were no instances given in the Native Land Court of the iwi interfering with the fishing rights of hapū.

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[2] See pages 9-10 and note 14, pages 378-379 *supra*.

Hapū fisheries could be divided into two types — those general fisheries, usually undeveloped or easily-worked, which were open to use by all people of the hapū; and developed fisheries such as *pā tuna* in which rights were attributed to the hapū but in practice only used by certain of its people. The most experienced and capable fishers in the hapū would work these fisheries on behalf of the whole tribe, and distribute their catches among the people; others would work other food resources such as bird trees or rat runs and distribute the fruits in the same way. In areas such as the upper part of Wairarapa Moana, the lake was divided into clearly-delineated hapū territories under the control of the hapū chiefs, but those portions of the lake seem to have been used by any person of those hapū and their composite smaller hapū who wished to do so, one of the chiefs saying that all of the people of the area were the "owners" of those portions. In other areas these hapū fisheries were not discrete, and hapū had intermeshing and overlapping fishing rights, which did not always correspond to the accepted land territories of each hapū. A good example was in the nearby fisheries in the swamps to the east of Wairarapa Moana, where the land was of little use for settlement. Hapū had numerous scattered fisheries, some held alone and some jointly, all over the wetlands. While the various rights of larger hapū were more thickly-spread in particular areas, there were no clear boundaries, and many smaller hapū with links to a number of groups had widely-spread fishing rights.

Some Pākehā observers have extended the pyramidical social structure often applied to traditional Māori society to resource rights such as fisheries, with large swathes of land and water under the control of the iwi, subdivided into major hapū holdings, which were subdivided further among the composite hapū of each major hapū, and so forth. It is clear from the Land Court evidence that this was not the case, and the fishing rights of small hapū and sub-sections of larger hapū highlight the flaws in previous analyses of freshwater fishing rights which sought to draw firm lines between the fishing rights of hapū and of whānau. Those freshwater fishing rights exercised by these smaller tribal groups were not usually completely under the umbrella of the larger hapū, as the older model implied. They occupied an intermediate stage between the rights of larger and smaller groups, and have characteristics drawn from both archetypal hapū rights and archetypal whānau rights.

While many smaller hapū groups acknowledged their descent from or other close links to the major hapū of each area, from whom they often traced their general rights over their whole area, in practice they could and did exercise proprietary as well as usage rights over fisheries without any substantial interference from the larger hapū. Sub-sections of acknowledged hapū,

which did not usually identify themselves under a hapū name of their own, also often had similar rights to those of these small hapū. Fishing rights in and the day-to-day control of particular fisheries, usually easily-managed medium sized fisheries such as an ordinary *pā tuna* or a small pond, were often attributed to the people of the hapū who lived in a particular *kāinga*, or some other similar section of the hapū. While in these cases the formal ownership of the fishery was often attributed to the hapū as a whole, usage rights and day-to-day management decisions were clearly said to have been vested in the smaller group, and control rights were also implied. The residual title said to be in the hapū implies that the hapū could step in if the long-term viability of the fishery was at risk.

Analogous rights also appear to have applied to some communities (groups defined primarily by common residence rather than kin ties), although they were not usually expressed as community rights because of the emphasis of the Court on hapū-based claims and the twin sources of title of *take tupuna* and *ahi kā*. These rights have also been hidden because of the close correspondence between the residential community and the kin group, and the complex inter-relationships often existing between different hapū living in the same area. On some occasions, fishing rights were claimed in the name of the hapū, but shorter lists of those people of the hapū who actually used the fishery were also given. Where these were not descendants of a more recent ancestor, they often proved to be that part of the hapū living in a particular *kāinga*, usually that closest to the fishery. The initial statements of claim given by the major witnesses for each party also often made a connection between kinship, residence, and resource rights. On some of the larger subdivisions of the Taupōnuiatia block, key witnesses established the claims of their hapū to the land by *take tupuna* and *ahi kā*, and then went on to list the various settlements on the block, the chiefs and "principal men" living there, and the resource areas (including fisheries) associated with each, implying that the rights to those fisheries were vested in the first instance in the associated community.

Whānau fishing rights were almost always claimed within a recognized overall hapū right to a general fishing area, except where rights to the fishery had been acquired by force or discovery and passed down the whānau line independent of rights to the adjacent land and waters. This may in part be a result of the Land Court process, which encouraged the presentation of claims based on hapū rights, but in many cases in many areas people spoke of a general fishing area being 'owned' by the hapū, while smaller individual fisheries within it such as small *pā tuna* and fishing holes were used by whānau. The whānau had the right to exclude other people of the

hapū from the fishery. Another feature of the Land Court evidence is that whānau rights were rarely claimed directly by name. Rather, the connection has been made through the comparison of whakapapa with the names given in association with the fishery. From the comparison, it can be seen that the use of many fisheries was restricted to a set of siblings, cousins or other close relatives. As the relatives named for each fishery were usually the older people of the whānau, their rights would normally have extended to their dependants as well. The practice of the Native Land Court in establishing the ownership of land as of 1840 has made it difficult to trace the transition of whānau fishing rights in particular from generation to generation — some fishing rights seem to have passed down to all those whānau members who remained within the area, while some smaller rights seem to have been bequeathed to a particular child and his or her immediate family.

As with the blurred line between the rights of small hapū and whānau fishing rights, it is difficult and not always meaningful to draw a firm distinction between whānau rights and personal rights. Some writers have found that strictly individual rights did occasionally exist, but only within the framework of the overarching hapū and whānau right — as with whānau rights, there was a right to exclude others of the larger group, but more limited proprietorial rights. On the surface, some individual rights do appear to have been claimed in the Land Court, as people told the judge that particular fisheries were theirs, or that they alone worked the fishery. On further examination most of these prove to be personal rights — that is, they also extend to the immediate household and dependants of the person claiming the right — as the claimant had said in their initial statement of claim that they also spoke on behalf of his or her children, and sometimes grandchildren or siblings. These personal rights, like whānau rights, usually relate to the use of a small fishery, although people often also claimed a personal right to share in the usage right to a particular larger fishery. Such claims to be included in a wider right were common in cases where the Court was determining relative interests or hapū lists for blocks which had already passed through their initial investigation.

Property rights are an integral aspect of the extent and nature of different kinds of freshwater fishing rights. Māori real property rights have consistently been characterized as common property rights — not public rights, open to all, but rather equal rights of access held by a defined group. In the case of freshwater fishing rights, that group could range from a number of large hapū, as in the seasonal eel fishery at the mouth of Wairarapa Moana, down to a small

family group. However, the actual nature of the right so commonly held has been subject to more debate. All agree that Māori property rights were not equal to full ownership rights in the legal English sense, as there was not a free right to alienate or transfer the property, or to treat the land as a commodity, nor were there strictly private and exclusive individual rights. The actual nature of fishing rights has been difficult to define in English terms, but many writers have used the analogy of usufruct — not in its older sense of a life interest to take produce from another's land, but in a more modern sense which conveys a right to use and to manage, and a right to exclude others from the use of the resource, but not a right to alienate without the concurrence of the entire tribe or group.

Although customary Māori freshwater fishing rights were not in the nature of a full legal right of ownership, the language of ownership has often been applied to some fishing rights, both for convenience of reference and also to convey a sense of the ultimate proprietary title available under customary tenure. For this reason hapū fishing rights have often been said to be 'owned'. This full proprietary right is made up of a bundle of rights, such as the right to control and regulate access, both by defining the criteria for belonging to the hapū and by regulating physical access to the fishery; a right to manage and develop the fishery; a right to invite others to share in the fishery; and a limited right to alienate the resource with the consent of the whole hapū. These rights were balanced by corresponding obligations, reflected in the language of *kaitiakitanga* or stewardship which has often been applied to Māori fishing rights. These obligations include the protection of the fishery from encroachment by outsiders and damage by overuse; respect for the gods who ensure an ongoing supply of fish and the health of the fishery; and a duty to pass the resource on to following generations in good condition. Iwi have been seen by many writers as having some sort of overright over the proprietorial fishing rights of the hapū, but in practice these seem to have been rarely used over freshwater fisheries and were restricted to a responsibility to see that the hapū and its leadership fulfilled their obligations.

Sometimes chiefs appear to have exercised proprietary rights over fisheries, particularly the right to grant fisheries or fishing rights to outsiders. However, modern writing on the nature of *rangatiratanga* and authority makes it clear that the rights of the hapū had been devolved onto these chiefs, and that they were acting as representatives of their tribes and making decisions with at least their tacit approval. Other individuals carried out the management function of the community in their capacity as *kaitiaki* or guardians. Individuals and whānau exercising their own fishing rights, held under the general proprietary right of the hapū, had more restricted

property rights in their fisheries. Their rights were more in the nature of an exclusive usage right — they could restrict the access of others in the hapū, and could control management at a day-to-day level, but they were circumscribed in their rights of transfer. They were not able to make any major decisions regarding the fishery that would impact on the rest of the hapū, such as transferring fishing rights to outsiders, or damaging the resource. While under normal circumstances they could exclude the rest of the hapū, their rights could be reassumed or transferred as punishment for transgressions affecting the strength and mana of the hapū, such as adultery or the improper use of *mākutu*.

This analysis of the relative property rights of iwi, hapū, whānau and smaller groups is drawn mostly from contemporary work on Māori property rights, as conclusions are difficult to draw from the Native Land Court minute books. Because of the translation of Māori testimony into English written records, using the terminology of English property rights without providing further explanations or a gloss of the English phrases used, the original Māori concepts are difficult to discern. Many passages dealing with fishing rights switch backwards and forwards between the language of usage and of ownership without any apparent distinction in the fishing rights being discussed. The Court also tended to see fishing rights as one of the strands making up the bundle of land rights, rather than as a separate entity capable of ownership in its own right. Nevertheless, the balance of the Court evidence suggests that the contemporary view is accurate. Phrases such as 'ownership' and 'belonging to' were applied most commonly to hapū fishing rights, while whānau rights and most particularly personal rights were more often described as a right to 'use' or a right to 'work'. The language of 'occupation' was also used for a whole range of rights, and sometimes seems to have been used to convey something stronger than a simple usage right, but still subject to the overright of the wider kin group.

There was a stronger degree of 'ownership' recognized over physical fishing devices such as *pā tuna, utu piharau* and artificial channels, even when the rights to these fisheries were exercised at a whānau or even personal level. Weirs on the Whanganui River were often said to 'belong to' the person who was responsible for the construction or maintenance of the weir, although they would require the assistance of others to carry out this work. The use of 'ownership' to refer to these personal, whānau or small hapū rights over weirs indicates the greater degree of input required to construct and maintain these structures, as well as their self-contained nature and the consequent simplicity of definition of the fishery. Although these weirs were often said to be 'owned' by individuals, they were usually also included in the summary of the fisheries

of the hapū, and seem to have been under a recognized hapū overright as with other whānau and personal fishing rights. The use of the language of 'ownership' represents a clearly-defined and exclusive usage right, together with a strong proprietary right in the fabric of the weir and the consequent responsibility for its upkeep and management, without implying that the hapū had no proprietary rights in the fishery. Despite the strong identification between particular weirs and families, catches from these weirs were frequently shared with the entire *kāinga* or hapū.

This analysis of property rights in fisheries concentrates on those fisheries found within the general area occupied by each hapū or collection of hapū, or within areas shared by a number of neighbouring hapū. Some fisheries were also held under non-territorial rights, that is, where the fishing rights were held independent of rights to the adjacent lands. This concept also borrows heavily from the language of Western property rights, in this case from the legal field of aboriginal rights. There is some difficulty in distinguishing between fisheries used from temporary camps for a short time each year as part of the tribe's traditional seasonal resource round, which may perhaps be better described as non-residential rights, and rights exercised in a fishery situated on an area otherwise associated with a different tribal group. In the Wairarapa there were numerous examples of people and hapū travelling from their normal residences at the upper lake to catch eels at the lake mouth in autumn; this was done through a long-established right based on *take tupuna*. Both the lower and upper lake people had strong usage rights, but the resident lower lake people had stronger rights of control and management. Similar arrangements existed for the summer kahawai fishery in the Whanganui estuary, but rights of control were more equally shared because the mouth was only used as a fishery during this time. Permanent non-territorial rights appear to have been relatively rare. Some did arise where small fisheries such as *pā tuna* had been seized by someone from outside the hapū originally possessing it, and passed down to the descendants of that person or group while rights to the adjacent land remained with the original 'owners'.

This potential severability of freshwater fishing rights from rights to the adjacent land raises the issue of the relationships between land, waters, and fishing rights. There is a clear and close association between rights over land (such as a right to occupy and build houses, and a right to cultivate the soil) and rights over waters (including fishing rights) when hapū rights over general areas are considered. In the summaries of claim given by the leading witnesses for each hapū or claimant party in the Native Land Court, the extent of their area and the basis of their

claim would be outlined, their whakapapa would be given, then the uses of the land and waters within those boundaries would be listed — routinely included were settlements, cultivations, birding trees, rat runs, and fisheries.

This does not mean that resource rights such as freshwater fishing rights are necessarily only an incident of land 'ownership', although Native Land Court judges typically did see fishing rights solely as part of the bundle of land rights. Investigations into the ownership of Wairarapa Moana by a Royal Commission rather than the Native Land Court brought out that rights in the upper lake and rights on the shore were co-dependent — it could equally be said that rights to occupy the shore stemmed from rights to fish in the lake off that shore, or that rights to fish in the lake stemmed from the right to occupy the shore. In areas like the swampy fringes of Wairarapa Moana, it is clear that Māori claimants in the Court considered fishing rights to be a much better indication of 'ownership' of or proprietary rights over the area as a whole than physical occupation. The severability of fishing rights by 'conquest' or divergent inheritance indicates that fisheries were capable of being dealt with as a separate and complete type of property, rather than dependent on the exercise of land rights.

There often appears to have been a bundle of resource usage rights associated with particular kin groups, or more commonly, those sections of a tribe living in a particular area. In areas such as the swampy fringes of Wairarapa Moana and western Taupō, the boundaries and *take* of the hapū were outlined, and then particular settlements were discussed in relation to the people who lived there and used named fisheries, cultivations, and other resource areas. In areas such as Wairarapa Moana where much land was too wet for settlement, the fish could be taken some distance to the *kāinga* of the fishers.

The hierarchical view of Māori social structure held by many earlier Pākehā observers, coupled with the Western system of investigating title to separate surveyable blocks in the Native Land Court, led many to believe that the linear boundaries laid down by Court surveyors were reflective of Māori methods of delimiting resources. Māori evidence from the Court and much recent research shows that this was not the case. Court claimants often traced their boundaries radially by naming the most distant of their resources, and it was then assumed by the Court that linear boundaries could be constructed by joining up the dots. This did not allow for overlapping and intermeshed resources at the fringes, nor did it take into account the fluidity of hapū

relationships and movement of people which gave groups a variety of rights to different types of resources scattered over quite large areas.

There is a particular problem with boundaries in fisheries, as Pākehā surveyors routinely used rivers and streams as the basis for land divisions, encouraging Court witnesses to treat them as boundaries. This is not to suggest that waterways did not form boundaries in Māori custom, as in many cases rivers and streams were included in the descriptions of ancestral boundaries given to the Court. Evidence from the Whanganui River shows that Māori did not see that river as divided down the middle, and use only the fisheries on their side. Where different hapū lived across the river, arrangements were reached to place the weirs of both in the most practical site, although some evidence suggested that each would then use the weir closest to their bank. This concentration on maximum fishing efficiency sometimes also led to weirs being placed some distance up or down the river from the associated *kāinga* or landing place. Elsewhere, near Taupō and at Wairarapa, fishing rights in streams dividing two hapū belonged to only one of those hapū, so that the boundary effectively ran along one bank rather than down the stream.

The focus of the Court on land has made it difficult to determine how boundaries were established and maintained when waterways were to be divided, rather than areas of land. In the Wairarapa swamp area some *wakarau tuna* were said to be divided between hapū, with each party working separate mouths. In other places boundary ditches were dug and used as exclusive fishing spots by those who constructed the ditch. In larger bodies of water, such as Wairarapa Moana and Lake Taupō, productive fishing grounds were seen as discrete areas and often associated with the shore settlement where the fishers lived. It is not clear how rights were shared in small streams where there were different hapū rights to the land on its banks, but as the most productive fisheries in streams were usually weirs or eel holes, it would be possibly for different groups to have their own separate fisheries dotted along its length.

Questions such as the definition of boundaries lead into the issue of the enforceability of fishing rights and their control and management. Traditional Māori society had no codified rule of law; yet there were clearly understood rules and penalties, and a number of guiding principles and practices were generally observed. In the first instance a tribe or a family's freshwater fishing rights were protected by their rights being widely known and understood. While all fishing rights were at risk of encroachment by outsiders, hapū rights were generally enforced by the armed strength of the hapu and the threat of full-scale retribution if an outside group

attempted to deprive the hapū of part of its economic strength and prestige. Likewise, smaller-scale rights falling under the hapū umbrella would almost always be protected from outside threat by the hapū, and the kaumātua of the hapū would have an important role in resolving internal disputes. Within hapū and even within iwi, the threat of spiritual and social sanctions against those who did not respect the acknowledged rights of others acted as a powerful regulatory influence.

There were some exceptions to these principles. When there were existing tensions between neighbouring hapū, matters could be precipitated and brought to a head by the deliberate violation or seizure of one tribe's fishing rights. A fight over the fishery often served to resolve the issue, and if the fishery was lost this was often an indication of a change in the power balance of the area or of the growth of the territory of one hapū at the expense of the other. On the other hand, minor but persistent 'poaching' by a hapū on the fisheries of their neighbours was often grudgingly tolerated if relations were otherwise good, if the party whose fisheries were being encroached upon was in a substantially weaker position, or if it was considered that the risk of bloodshed far outweighed the actual losses from the poaching. In such cases in Taupō, the party whose rights were being infringed usually claimed to have known about it but never actually caught the poachers in action, thus continuing to assert their rights while not wishing to make a major issue of the situation. However, if allowed to go on indefinitely this would confuse the origins of the rights and contribute to the complicated intermingling of rights found in the disputed areas between hapū.

Within the tribe or family group there were certain individuals who exercised key roles in the management and development of the freshwater fisheries. As has already been examined, the *rangatira* or hapū chiefs played an important role with regard to the hapū fisheries. They acted on behalf of the hapū and as its representative in exercising many of its proprietary functions. Combining the spiritual and temporal authority which had passed down to them from their ancestors, chiefs with the most forceful personalities and strongest popular followings had the greatest influence over the hapū and its fisheries. For example, particularly charismatic chiefs had greater scope to make gifts of fishing rights or fish from hapū resources than did those chiefs who did not have the complete respect of all those with an interest in the fishery. This type of role was often expressed in the Land Court as mana over the land or the fisheries, although this is not a usage that sits very well with modern interpretations or usages of mana, as Māori

concepts and expressions of property rights have changed since pre-contact times in response to the new environments in which these rights have been expressed. The role undertaken by most chiefs included ritual functions such as the ceremonial opening of seasonal fisheries (as seen at the mouth of Wairarapa Moana), the formal imposition of *rāhui* or closed seasons when appropriate, the setting out of boundaries, and the apportionment and reallocation of the fishing resources of the hapū amongst its composite minor hapū and whānau when necessary. In these roles chiefs usually combined the spiritual and temporal authority which had passed down to them from their ancestors. These chiefs often did not actually work the fisheries themselves, but received gifts of fish from the fishers of the hapū.

While the hereditary chiefs fulfilled many of the key spiritual and public functions related to the fishery, its day-to-day management was more often in the hands of people now described as the *kaitiaki* or guardians of the resource. They were those people in the community who had the closest contact with and most knowledge of particular fisheries, and controlled its use at a local level. In the Land Court, many senior people spoke of directing their younger relatives or people from their *kāinga* to catch fish at particular places under their control, on behalf of the whole community. The most expert fishers were known as tohunga, and were well-versed both in fishing practices and in the ritual observances and *karakia* needed to ensure that the goodwill of the gods was obtained and the fish were there to be caught. The distribution of catches amongst the group entitled to share the fish was also undertaken by trusted senior members of the community.

One of the purposes of applying a regional case study structure to this thesis was to establish if there were significant variations in freshwater fishing rights in different areas and amongst different iwi. What has been highlighted is that fishing rights were similar in their nature and extent throughout most of New Zealand, especially the North Island. This is not to say that the same picture of freshwater fishing rights has been presented in each of the case studies. There were a number of different concerns given emphasis in each region, depending upon a number of factors such as the usual size of blocks under investigation, the level of Pākehā settlement in the region at the time of investigation, and local contemporary political and social tensions.

The overall concerns of each case study reflect both the nature of the sources and of the fishery. The two Wairarapa case studies provide an interesting counterpoint, as the main body of

the lakes and the fishing rights in them have been examined as a unitary fishery (reflecting the approach taken by both the Native Land Court and the Royal Commission on the lakes), while rights in the swamps to the east of the lake have been examined on a fishery-to-fishery basis because of the availability of sufficiently detailed evidence. This raises issues such as the allocation of fisheries amongst related hapū in the upper lake and contrasts this with the allocation of fisheries in the bordering swamp areas among the smaller associated hapū and whānau making up those same larger hapū. The rich fishery at the lake mouth, shared by numerous hapū resident both there and elsewhere, gave an opportunity to examine the relationship between usage rights and control and management at a hapū level, whereas the detailed evidence given in the Tipua Mapunatea case highlighted aspects of control down to allocations and management at personal and whānau level.

In some regions there do appear to have been differences in social structure which could have been expected to have an effect on freshwater fishing rights, but the strong focus of the Native Land Court on land and tenure issues has made it difficult to isolate such effects. The South Island fisheries have not been examined in sufficient detail to make any final judgments, but even so it seems that freshwater fishing rights in the South Island (especially when examined from the perspective of rights over individual fisheries) consisted of the same bundle of rights as in North Island fisheries. The differences came in the much wider areas covered by most South Island hapū and whānau, given the low population densities and lesser emphasis on horticulture. In Whanganui, the missionary Richard Taylor wrote of different marriage patterns, with men usually travelling to live with their wives' hapū rather than vice versa. This might be expected to have an effect on the transmission of fishing rights, given that many observers have said that the rights of women to inherit were limited. Closer examination of the Land Court evidence shows that this was not the case, as gender was not in practice an important factor in the inheritance of land and fishing rights. The concentration on gender issues in Whanganui is a reflection of the greater availability of evidence rather than any clear difference between Whanganui and other areas.

In closing, it is clear that the interpretation of customary freshwater fishing rights developed over the last two decades is much more consistent with the evidence as to the nature and extent of those rights given by Māori in the Native Land Court in the nineteenth century than were most earlier Pākehā interpretations. This reflects a change in official and academic attitudes

to Māori and their rights. The current model does not rely solely on formalized Pākehā knowledge and analytical interpretations in the Western tradition, but also draws heavily on traditional Māori interpretations and the evidence of those schooled in the Māori intellectual tradition. This has given us a much more complicated, fluid, and holistic view of freshwater fishing rights than the more rigid and formal older Pākehā model. Māori knowledge and evidence had not been drawn on to such a degree since the earliest observers of Māori society made their initial interpretations of aspects such as fishing rights, which were quickly overlaid by political considerations and interpretations because of the conflict between Māori rights and Pākehā aspirations. It is only the return to a respect for Māori evidence and interpretations that has allowed a more complete and inclusive analysis to be constructed.

GLOSSARY

ahi kā (roa)	literally 'long-burning fires'; long-term occupation of land and resources which justifies and reinforces title to that land; occupation rights.
ariki	high chiefs, paramount chiefs, senior chief of an **iwi**, deriving their power from their connection to the gods, their ancestry, their personal qualities, and the extent of their territorial influence.
aroha	goodwill, compassion; love; sorrow, pity, sympathy.
atua	god; supernatural being; spirit.
awa	stream; river.
awa-whaka-heke	small channels used to trap fish.
hākari	feast; exchange of food.
hāngi	earth oven, also known as **umu**.
hao	migrating eel, mud eel; dredge rakes for **kōura**.
hapū	sub-tribe descended from a common ancestor; a combination of *hapū* or of related smaller *hapū*; division of an **iwi**. In modern usage it may also be synonymous with **iwi**.
Hauhau	adherents of the **Pai Mārire** faith, founded by Te Ua Haumēne, many of whom fought against imperial and colonial troops in the New Zealand Wars of the 1860s.
heke	migration.
hīnaki	wickerwork pot or trap used to catch eels and fish.
huahua	game (especially birds) preserved in their own fat.
hui	meeting, gathering.
ika	fish. Māori do not define **tuna** or eels as fish.
inanga	whitebait, *Galaxias maculatus*; juvenile of a number of fish species; smelt, *Retropinna retropinna* and *Stokellia anisodon.*
iwi	tribe; people.
kahawai	coastal sea fish, *Arripis trutta*, which enters many river estuaries in summer.
kai (awa, moana, roto)	food (from rivers, the sea, lakes).
kaihaukai	exchange of food; feast.
kāinga	unfortified village or settlement; home. *cf.* **pā.**
kaitiaki(tanga)	guardian(ship), trustee(ship), protector; guardian spirit.
kaiwhakahaere	administrator, organizer, conductor, supervisor.
kākahi	freshwater mussel, *Hyridella aucklandia* and *H. menziesi*.
karakia	prayer; invocation to the gods; ritual incantation.

kaumātua	respected elders, senior members of a **hapū** or **iwi**; head of a **whānau**.
kawa	protocol.
Kīngitanga	the Māori King Movement.
kōaro	New Zealand gudgeon, *Galaxias brevipinnis*.
kōkopu	a number of fish species of the genus *Galaxias*, also known by names such as mountain trout or native trout.
kōkōwai	red ochre.
korokoro	lamprey, *Geotria australis*.
koroua	grandfather or other elderly male relative; old man.
Kotahitanga	unity, solidarity; pan-Māori tribal unity movement which flourished in the late nineteenth century.
kōumu	small channels used to trap fish, especially channels dug into a river or lake bar to take migrating eels.
kōura	lobster; freshwater crayfish, *Paranephrops planifrons* and *P. zealandicus*.
kuia	grandmother or other elderly female relative; old woman.
kūmara / kūmera	sweet potato, *Ipomoea batatas*.
kūpapa	literally 'neutral'; 'Friendly Māori' who fought alongside the government during the New Zealand Wars.
kupenga	fishing net.
mahinga kai	places where food is procured or produced.
mahinga tuna	literally 'eel works'; eel fisheries.
mahi noa iho	unauthorized act; squatting on land.
mākutu	the use of spiritual power to inflict harm on others; a curse; described by many **Pākehā** as witchcraft or sorcery.
mana	power of the gods; power of the ancestors; authority stemming from the indwelling of spiritual power; authority that stems from both the gods and inheritance; the ability to do and get things done; authority; control, power; influence, charisma; status, prestige.
mana moana	customary rights and authority over the sea.
mana tangata	influence and authority over people; political authority.
mana whenua	customary rights and authority over land; power of the land to yield produce.
manaakitanga	hospitality; entertainment; support, caring.
mangemange	creeper, a climbing fern, *Lygodium articulatum*.
manuhiri	visitors.
mānuka	New Zealand tea-tree, *Leptospermum scoparium*.
marae	village courtyard in front of the **wharenui** or carved meeting house; meeting place of the community.
mātaitai	seafood.

mātaotao cold, extinguished. Rights to land would be expressed as *ahi mātaotao* or 'an extinguished fire' if people were absent for an extended length of time. *cf.* **ahi kā**

matua (pl. mātua) parent, close relative of parents' generation.

mauri life force, life principle or life essence of individual people and creatures such as fish, and rivers, forests, and houses; power of the gods; material objects in which **atua** lodge. The *mauri* of resources such as fisheries was often ritually transferred to a stone or other talisman, which would be carefully hidden and protected to prevent it being damaged by malicious acts. See **mākutu**.

moana sea; large lake.

mohoao black flounder, *Rhombosolea retiaria.*

mōrehu survivor, remnant; especially of a **whānau** or **hapū** badly hit by population decline.

ngaore juvenile **inanga**; smelt, *Retropinna retropinna* and *Stokellia anisodon.*

ngārara reptile, monster.

noa free from **tapu**, free from the influence of the gods, free of religious restriction; associated with the human world, ordinary, relaxed. *cf.* **tapu**.

noa iho done without right or cause.; just, merely.

pā stockaded or fortified village or settlement. *cf.* **kāinga**; weir used to catch fish.

pā auroa type of eel weir built nearly parallel to current, especially that used in the rapids of the Whanganui River.

pā inanga weir used to catch inanga.

pā kanakana see **utu piharau**.

pā tuna eel weir.

pahī temporary camping place.

Pai Mārire (lit. 'good and peaceful') Māori religious faith derived from the teachings of the prophet Te Ua Haumēne in the early 1860s.

Pākehā New Zealander of European descent; a term used by Māori since contact, and used increasingly in recent years by *Pākehā* to refer to themselves.

papanoko torrentfish, *Cheimarrichthys fosteri.*

papatipu Māori customary land, land not passed through Native Land Court (modern sense).

paraki smelt, *Retropinna retropinna* and *Stokellia anisodon.*

pātaka storehouse for food, raised on posts.

pātiki flounder.

pāua shellfish of the genus *Haliotis*, abalone.

piharau lamprey, *Geotria australis.*

pōhā	storage container for preserved food, usually made of kelp; leading net joining **hīnaki** to **pā tuna**; storage corf or basket for live fish or eels.
pōrohe	smelt, *Retropinna retropinna* and *Stokellia anisodon*.
pou	post, often used to mark boundaries or possessions.
pounamu	greenstone, nephrite or bowenite jade.
pūtake	base, root; reason, cause, rationale; ancestor from whom an ancestral claim is derived.
rāhui	a form of **tapu**; restriction of access to a resource, to prevent over-use or infringement of **tapu**, or to set it aside for a special purpose; conservation; protection.
rangatira	chief; chief of a hapū. *cf.* **ariki**.
rangatiratanga	chieftainship; traditional authority.
raupatu	conquest of land; government confiscation of Māori land following the New Zealand Wars.
reo	language. *Te reo Māori* = the Māori language.
rewharewha	influenza; one of the series of great epidemics of the late eighteenth and early nineteenth centuries.
rohe	boundary; territory, tribal region.
Rohe Pōtae	the King Country, a region in the central North Island.
roto	lake.
rua	hole; burrow.
rūnanga	committee; assembly; council (usually local).
take	claim; reason, cause, base; concern; issue for discussion.
take raupatu	claim to land through conquest.
take tupuna/tipuna	claim to land through ancestry.
take tuku	claim to land through gift.
take whanaunga	claim to use land through kinship with owner.
Tangaroa	god of the seas, lakes, and rivers, and father of the fish and other water creatures.
tangata (pl. tāngata)	person.
tāngata whenua	the people of the land, local people; original inhabitants.
taniwha	legendary water-monster. Sometimes used figuratively to refer to powerful chiefs.
taonga	prized possession; treasure; property.
tapu	associated with the gods; under the influence of the gods; under religious restriction; under sanction; sacred; inviolable; a force regulating social behaviour. *cf.* **noa**.
tāruke	crayfish pot; bundles of fern used to trap fish.
taua	war party; expedition.
taupahī	camping place, temporary settlement.

taurekareka captive taken in war, who loses their **mana** and rights; slave.

teina (pl. **tēina**) younger sibling or cousin of same sex, member of a junior branch of a family. *cf.* **tuakana**.

tikanga customs; the ways in which **kawa** is implemented.

tipuna see **tupuna**.

tītī muttonbird, sooty shearwater, *Puffinus griseus* and *Pterodroma macroptera*.

tohu sign, mark, symbol.

tohunga learned person or specialist in the practices, rituals and **karakia** of a particular craft (*i.e.* fishing, carving, planting).

toitoi various species of bully of the genus *Gobiomorphus*; cockabully, *Trypterygion nigripenne*.

tuakana (pl. **tuākana**) elder sibling or cousin of same sex, member of a senior branch of a family. *cf.* **teina.**

tuku whenua gifting of land.

tuna eel, *Anguilla dieffenbachii* and *A. australis*.

tunaheke migrating eels.

tunariki glass eels, elvers.

tupuna/tipuna (pl. **tūpuna/tīpuna**) ancestors; grandparents and other close relatives of grandparents' generation.

tūrangawaewae lit. 'standing place for the feet', place of the **tāngata whenua**, home base; ancestral land.

upoko ariki paramount chief.

upokororo New Zealand grayling, *Prototroctes oxyrhynchus*.

utu principle of reciprocity, both positive and negative; satisfaction; recompense; revenge; price (modern sense).

utu piharau lamprey weir.

waharua large double-ended **hīnaki**.

wahine (pl. **wāhine**) woman, wife.

wai water.

wairua soul; spirit, spirituality.

waka canoe; tribal confederation (based on common descent from the crew of a particular canoe).

wakawaka (Ngāi Tahu) share of resources, divided out between different **hapū** and **whānau** on the basis of ancestral rights; physical territory of such a share; **mahinga kai** area; channels dug into bar of a river or lake to trap migrating eels.

whakamate canals used to divert and catch migrating eels.

whakanoa to lift or nullify **tapu**; to free from **tapu**; to make ordinary.

whakapapa genealogy; lineage, family tree and history.

w(h)akarau (tuna) to capture (eels); eel fishing area (South Island); method of catching fish in clumps or mats of bracken.

whakatauākī proverb; tribal saying.

whānau family, extended family.

whanaungatanga relationships, kinship, family ties.

wharenui carved meeting house, see **marae**.

whare wānanga house of learning, where chosen pupils were instructed in spiritual matters and tribal history; school of higher learning.

whata drying rack for fish.

whenua land.

Note on pronunciation: Māori vowels are pronounced as are pure vowels in Italian or similar languages — 'a' as in f*a*r, 'e' as in 'b*e*d', 'i' as in 'm*e*', 'o' as in '*o*rb', 'u' as in m*oo*n. The macrons indicate a long vowel, with the pronunciation lengthened rather than changed. Combinations of vowels do not form diphthongs, but are run together. The consonants have their English pronunciations, except for 'ng', which is soft as in 's*ing*ing'; 'r', which falls between the English 'l', 'd' and 'r'; and 'wh', which is pronounced as a soft 'f' or a voiced 'w', as in the Scottish 'wh'.

Note on dialect: Māori has different regional dialects with different vocabulary, and in some cases different sounds which sometimes affect the way words are spelt. For example, in the southern South Island the sound 'ng' is replaced by 'k'. Thus southern Ngāi Tahu (or Kāi Tahu) spell and pronounce *kāinga* as *kāika*. Eastern North Island iwi often replace the 'ou' sound with 'au': *e.g. tatou* (we, us) is spelt and pronounced by Ngāti Porou and others as *tatau*. Ngāti Awa and Tūhoe usually substitute 'n' for 'ng'; and in Taranaki and Whanganui the consonant 'wh' is pronounced as 'w' with a following glottal stop (hence the common spelling and pronunciation 'Wanganui' for Whanganui).

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ABBREVIATIONS

AJHR	Appendices to the Journals of the House of Representatives (New Zealand)
ATL	Alexander Turnbull Library, Wellington, New Zealand
DCR	District Court Reports
DNZB	The Dictionary of New Zealand Biography
JPS	The Journal of the Polynesian Society
JRSNZ	The Journal of the Royal Society of New Zealand
MB	Native Land Court Minute Book
N.A.	National Archives, Wellington, New Zealand
NZAAN	New Zealand Archaeological Association Newsletter
NZJA	New Zealand Journal of Archaeology
NZJH	New Zealand Journal of History
NZJST	New Zealand Journal of Science and Technology
NZ Jur.	New Zealand Jurist Reports
NZLJ	The New Zealand Law Journal
NZLR	New Zealand Law Review
NZPD	New Zealand Parliamentary Debates
NZULR	New Zealand Universities Law Review
PMP	The People of Many Peaks: The Maori Biographies from the Dictionary of New Zealand Biography
TPNZI	Transactions and Proceedings of the New Zealand Institute
VUWLR	Victoria University of Wellington Law Review

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